Supreme Court, U.S.
FILED

NO. 03-693 NOV 6 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48, *et al.*,

Petitioners,

v.

JOSEPH J. HILLS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT G. SCHAFFER
Counsel of Record

MARY ELLEN SIMONSON
KIMBERLY A. DEMARCHI
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a school district in its limited public forum is constitutionally required, under the Free Speech Clause of the First Amendment, to distribute literature to elementary school children that arguably addresses otherwise permissible subjects from a religious perspective, while also required to scrutinize, edit and restrict "proselytizing" speech.

2. Whether a school district policy creates an excessive entanglement of government with religion in violation of the Establishment Clause when the district allows religious perspectives on topics that are otherwise arguably permissible in the limited forum, but also must act as religious editors, screening and excluding material to ensure that the forum is not used for speech that is too religious or "proselytizing" in nature.

3. Whether a school district policy restricting access to its literature distribution program to materials from nonprofit organizations that are not commercial, political, or religious in nature is viewpoint-neutral.

PARTIES TO THE PROCEEDING BELOW

Petitioners are Scottsdale Unified School District, No. 48, Barbara F. Erwin, Superintendent of Scottsdale Unified School District, Jane McGlothlin, Assistant Superintendent of Scottsdale Unified School District, Bobbie Sferra, Assistant Superintendent of Scottsdale Unified School District, and Lisa Martens, District Communications Specialist.

Respondent is Joseph J. Hills.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Scottsdale Unified School District No. 48 states that it has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPLORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. The District's Literature Distribution Policy	2
B. The Religious Brochure	3
C. The Lawsuit	3
REASONS FOR GRANTING THE PETITION	5
I. The Decision Below Reflects Confusion over the Interaction Between the Free Speech and Establishment Clauses that Only this Court Can Correct	6
A. The Decision Below Requires the Type of State Entanglement with Religion this Court Has Held the State Must Avoid	6
B. This Case Requires Resolution of the Issue Left Undecided by this Court in *Good News Club*	8
II. The Issue Presented Is Recurring and of Great Practical Importance	8
III. The Decision Below Is Incorrect	10

TABLE OF CONTENTS – Continued

Page

A. The Court of Appeals Erred in Holding that the District May Distribute Religious Materials Through the District's Literature Distribution Program Consistent with the Establishment Clause 10

B. The Court of Appeals Erred in Holding that the District Engaged in Viewpoint Discrimination 11

IV. This Case Presents Issues that May Be Resolved by a Case Currently Pending Before this Court 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASE — Page

FEDERAL CASES

Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 7

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 1, 4, 6, 8

Keney v. New York, 388 U.S. 440 (1967) 12

Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2002) 12

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 12

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 7, 12

Widmar v. Vincent, 454 U.S. 264 (1981) 7

DOCKETED CASES

Elk Grove Unified School District v. Newdow, No. 02-01624 (cert. granted Oct. 14, 2003) 12

RULES, REGULATIONS AND STATUTES

United States Code:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 1367 1

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1-24) is reported at 329 F.3d 1044. The opinion of the District Court (App., *infra*, 27-46) is unreported.

JURISDICTION

The Court of Appeals' judgment was entered on May 22, 2003. A timely petition for rehearing was denied on July 19, 2003. On September 29, 2003, petitioner was granted an extension of the deadline to file this petition to November 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343, and 1367.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

STATEMENT

This case raises two questions left undecided by this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) – (1) whether a state's interest in avoiding an Establishment Clause violation can justify

viewpoint discrimination within a limited public forum and (2) the extent to which a limited public forum of this nature can exclude religious materials. Under the balance struck by the Ninth Circuit, school districts and other government entities are left with an impossible conundrum – they must allow religious perspectives on otherwise permissible topics in their forums, but must also act as religious editors, screening and excluding material to ensure that the forum is not used for proselytizing.

A. The District's Literature Distribution Policy

The Scottsdale Unified School District allows third parties a limited opportunity to distribute literature to its elementary and secondary students to inform them of suitable community activities. (App. 49). During the relevant time, the policy required District pre-approval of materials to be distributed but had a blanket prohibition on "non-school-originated material of a commercial, political or religious nature." (*Id.*). The purpose of this prohibition was to allow the District to maintain a position of neutrality on such matters, thereby avoiding the appearance of approving any political or religious view or endorsing a commercial product.

After the District approved a particular flyer for distribution, it would inform the party who wished to distribute the flyer, who would deliver the necessary copies to each school. The school would distribute the materials either by giving them to teachers to hand to students or placing them in a container in the school office.

B. The Religious Brochure

Respondent Joseph Hills submitted a brochure for distribution to elementary students in the District advertising a summer camp. The camp would include various classes, including two with religious content. (App. 50-58). The course description for a class entitled "Bible Heroes" promised an opportunity to "learn about our greatest example JESUS" and encouraged readers to "Come, join us in the Word." (*Id.* at 52). The description for "Bible Tales" asked readers "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by the age of 12, chances are slim that they ever will in this life?!" and expressed the opinion that "We think it is important to start as young as possible." (*Id.*). Adjacent to these course descriptions, the brochure contained religious images including the Bible and a cross.

The District, which has previously approved many flyers from Mr. Hills advertising his secular woodworking classes, approved Mr. Hills' flyer for distribution after a cursory review that failed to detect the religious content. After receiving complaints about the brochures' contents, the District conducted a more thorough review and rescinded its approval. The District briefly proposed allowing Mr. Hills to distribute the brochure with a disclaimer, but ultimately determined that even a disclaimer would not protect it from Establishment Clause concerns and forbade distribution entirely.

C. The Lawsuit

Following the District's decision, Hills initiated this lawsuit, challenging the District's refusal to distribute his

flyer as a violation the First Amendment's protections of free speech and free exercise of religion, of the federal constitutional rights of equal protection and due process; the federal establishment clause; the Arizona Constitutional guarantees of free speech and free exercise; and the Arizona statutory guarantee of free exercise.

The District Court granted summary judgment in favor of the District. (App. 27-46). The District Court held that the literature distribution forum was a nonpublic forum open for a limited purpose. (*Id.* at 37). The court also found that the District's exclusion of religious materials from the forum was reasonable in light of the District's concerns about violating the Establishment Clause, was content-based and viewpoint-neutral, and was therefore constitutionally permissible. (*Id.* at 38-42). The District Court also rejected Mr. Hills' remaining challenges to the policy. (*Id.* at 43-46).

The Court of Appeals reversed in a per curiam opinion. (App. 1-24). Citing *Good News Club*, the court held that the District's policy was not viewpoint neutral as applied to Mr. Hills' brochure. (*Id.* at 15). It found that Mr. Hills' brochure addressed the permissible subject of "summer camps" from the viewpoint of Christianity, rather than addressing the subject of religion, which the Court held the District could properly exclude from its limited forum. (App. at 9, 12-13).

Nonetheless, the Court of Appeals held the District was not required to distribute Hills' brochure as submitted, because some of the statements in the brochure fell outside the scope of the District's limited forum. (*Id.* at 15-16). Identifying some of the language quoted above, the

Court held that the District was not required to distribute proselytizing material:

> This language was promotional not only of the class but of religion, and went beyond a description of the organization's general religious mission to directly exhort the reader to involve children in religious observance. . . . [T]he District is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this exceeds the purpose of the forum the District created. Exclusion of such material would not be based on viewpoint, but on subject matter. In other words, the District cannot refuse to distribute literature advertising a program with underlying religious content where it distributed quite similar literature for secular summer camps, but it can refuse to distribute literature that *itself* contains proselytizing language. The difference is subtle, but important.

(*Id.*). The court recognized that this distinction might be necessary to allow the District to avoid a possible Establishment Clause violation arising from the distribution of religious proselytizing. (*Id.* at n.6). The court held that distribution of literature advertising religious programs or events would not itself pose such problems. (*Id.* at 16-22).

REASONS FOR GRANTING THE PETITION

The decision below puts schools in the untenable position of religious editors, scrutinizing literature to be distributed through their schools for unacceptable, "proselytizing" content that would pose Establishment Clause problems and excising that language, while allowing

"religious viewpoints" on otherwise permissible topics. Whether this level of oversight in limited public forums is constitutionally permissible or constitutionally required is a vital and recurring issue of great importance to schools if they wish to continue to provide such limited public forums to benefit their students and communities.

This case also presents the next step in this Court's line of cases addressing access to public forums, requiring resolution of the precise issue left undecided in *Good News Club* – whether avoidance of an Establishment Clause violation can justify what is arguably viewpoint discrimination. *Good News Club*, 533 U.S. at 112.

I. The Decision Below Reflects Confusion over the Interaction Between the Free Speech and Establishment Clauses that Only this Court Can Correct.

A. The Decision Below Requires the Type of State Entanglement with Religion this Court Has Held the State Must Avoid.

In evaluating the Establishment Clause implications of allowing speech reflecting a sectarian perspective in limited public forums, this Court has repeatedly admonished forum administrators to avoid limitations that would require them to act as religious editors, scrutinizing the speech presented for admission and excising religious references:

> [A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.

Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 253 (1990) (plurality opinion) (citing *Widmar v. Vincent*, 454 U.S. 264, 272 n.11 (1981); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995).

> We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."

Widmar, 454 U.S. at 272 n.11.

The Court of Appeals' decision *requires* the District to engage in just the type of "invasive monitoring" of speech within its forum that this Court held would pose Establishment Clause problems, finding such entanglement necessary to protect the free speech rights of forum participants. The Court of Appeals suggests that the District can distinguish between material that "contains direct exhortations to religious observance" and material that merely advertises an event that "is obviously cast from a particular religious viewpoint." (App. 14, 15). In essence, this invites the District to ask whether a given item of speech is "too religious" for the purpose of the forum. This type of inquiry, however, is forbidden by the Establishment Clause under the Court's prior admonitions in *Widmar*, *Mergens*, and *Rosenberger*.

B. This Case Requires Resolution of the Issue Left Undecided by this Court in *Good News Club*.

The Ninth Circuit's decision also presents the unanswered and widely recurring question of whether avoiding an Establishment Clause violation may serve as a compelling interest justifying otherwise unconstitutional viewpoint discrimination in a limited public forum. Under the Ninth Circuit's decision, the District is required to violate the Establishment Clause by appointing itself religious editor of the speech in its forum in order to avoid viewpoint discrimination in violation of the Free Speech Clause. In the *Good News Club* case, this Court left open the question whether the prospect of an Establishment Clause violation could justify viewpoint discrimination. 533 U.S. at 112-13. This case presents the issue reserved in *Good News Club*.

II. The Issue Presented Is Recurring and of Great Practical Importance.

If the Court of Appeals' decision stands, schools will have no choice but to close their limited public forums. If they follow the Ninth Circuit's free speech holding, they will inevitably commit Establishment Clause violations, whether by exercising editorial control over submitted materials or by distributing materials that cross the "subtle but important" line the Ninth Circuit has drawn between materials that express a religious perspective on a permissible topic and materials that proselytize on the properly excluded topic of religion. (App. at 16). The District and other similarly situated governmental bodies are in an impossible bind: they cannot allow excessively religious speech into their forum without violating the

Establishment Clause, yet they also cannot parse through speech to determine exactly which speech crosses the line without creating an excessive entanglement with religion that would itself violate the Establishment Clause.

The language in the flyer at issue exemplifies this problem. The Court of Appeals cited one line of the brochure as an example of "proselytizing" speech the District could constitutionally prohibit: "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible." (App. at 52). But this is far from the only problematic language in the flyer, which also contains exhortations to "Come, take an adventurous ride back into time with us, and learn about some ordinary people whose faith in GOD helped them accomplish extraordinary things," to "learn about our greatest example JESUS," and to "Come, join us in the Word." (*Id.*). Instead of clarifying the issue, the Court of Appeals avoided it. (App. 16 ("[W]e are not called upon in this case to parse each individual line in Hills' brochure.")). School districts, unfortunately, will not be able to avoid addressing these questions.

The only way a district can avoid this quandary is not to open its forum at all. This would do a great disservice to the community and the students. For instance, in a single year, the District receives over 200 flyers for review and distribution from organizations such as the Girl and Boy Scouts, the Boys and Girls Club, camp providers, and groups sponsoring community events.

III. The Decision Below Is Incorrect.

A. The Court of Appeals Erred in Holding that the District May Distribute Religious Materials Through the District's Literature Distribution Program Consistent with the Establishment Clause.

In holding that distribution of Mr. Hills' flyer (apart from its proselytizing language) would not violate the Establishment Clause, the Court of Appeals focused on the nature of the activities advertised in the flyer, rather than the advertisement itself. However, this is not a facilities access case. The District never sought to control what Mr. Hills actually taught in his summer school or where he taught it. The District's sole concern was with the language of the flyer that he wished to distribute to the District's elementary school students through the District's program.

The Court of Appeals relied on this Court's cases involving public access to facilities, despite the fact that the presence of a community group on school grounds, typically outside of school hours, creates a different and significantly lesser threat of endorsement than the literature distribution at issue here. The District's concern was not with what Mr. Hills included in his summer camp, but in how this camp brochure communicated to children. Allowing distribution of Mr. Hills' flyer through the District's distribution system would result in teachers handing materials advertising Bible study classes to young students in the classroom. It is this conduct that must be evaluated. That the actual classes would have taken place somewhere else, at a different time, with parental consent, are all immaterial to the moment of contact between teacher, student, and flyer. That communication occurs on

campus, during school hours, to young elementary school students, and without parental mediation, raising a much more significant prospect that the student will perceive the school as endorsing the materials they are instructed to carry carefully home for their parents to review.

B. The Court of Appeals Erred in Holding that the District Engaged in Viewpoint Discrimination.

The Court of Appeals held that the District's exclusion of Mr. Hills' brochure constituted impermissible viewpoint discrimination because Mr. Hills' brochure discussed a topic included in the forum (non-profit summer camps) from a religious perspective. (App. at 12-13). The District did not exclude Mr. Hills' brochure because it addressed camps from a religious perspective but because it directly addressed a religious subject matter – the study of the Bible and Biblical figures. Thus the District properly excluded the brochure on the basis of its religious *content*, as it would have done irrespective of what perspective Mr. Hills had on that content. Indeed, Mr. Hills himself acknowledged that his proposed classes would not address morality and character development from a Christian perspective but would provide a *religious perspective* on the *religious subjects* of doctrine and scripture. (App. 39).

The nature of the forum at issue here is fundamentally different from the forums considered in this Court's facilities access cases. Those forums were all forums intended for collective, expressive activities. Accordingly, this Court held that expressive activities could not be excluded because of their viewpoint, and noted the particular importance of neutrality in an educational context, where the exchange of ideas should be fostered. *See*

Rosenberger, 515 U.S. at 835. The District's literature distribution program, conversely, was not intended for dialogue or the exchange of ideas. The literature distribution program is intended solely for the one-way transfer of information about activities appropriate for students, facilitated by the schools' ability to distribute materials to students and instruct them to give the information to their parents. As this Court has recognized, in such a limited forum, restricting access on the basis of speaker identity and subject matter may be necessary to ensure that the forum is limited to its intended purpose. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (discussing this need in the context of a non-public forum). Without the District's restriction of religious and political content, the forum would expand beyond its very limited informational role and would send the message that the District endorsed distribution of the ideas expressed within the forum. The District's content-based restrictions were neutral and constitutionally permissible.

IV. This Case Presents Issues that May Be Resolved by a Case Currently Pending Before this Court.

In the event that this Court does not presently grant the petition for a writ of certiorari, it should hold this case for its decision in *Elk Grove Unified School District v. Newdow*, No. 02-01624 (cert. granted Oct. 14, 2003), which likewise raises questions concerning what constitutes an Establishment Clause violation in the particular setting of an elementary school. *Newdow v. U.S. Congress*, 328 F.3d 466, 488 (9th Cir. 2002) (noting particular risk of coercion in elementary school setting); *cf. Keney v. New York*, 388

U.S. 440 (1967) (petition held until decisions were reviewed in other related cases).

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 6th day of November, 2003.

LEWIS AND ROCA LLP

MARY ELLEN SIMONSON
ROBERT G. SCHAFFER
(*Counsel of Record*)
KIMBERLY A. DEMARCHI

Attorneys for Petitioners
Scottsdale Unified School
District No. 48, et al.

329 F.3d 1044

United States Court of Appeals,
Ninth Circuit.

Joseph J. HILLS, Plaintiff-Appellant,
v.
SCOTTSDALE UNIFIED SCHOOL DISTRICT, No. 48; Barbara F. Erwin, in her official capacity as Scottsdale Unified School District Superintendent; Jane McGlothlin, in her official capacity as Scottsdale Unified School District Assistant Superintendent; Bobbie Sferra, in her official capacity as Scottsdale Unified School District Assistant Superintendent; Lisa Martens, in her official capacity as District Communications Specialist, Defendants-Appellees.

No. 01-17518.

Argued and Submitted Oct. 25, 2002.
Submission Withdrawn Oct. 31, 2002.
Resubmitted March 6, 2003.
Filed May 22, 2003.

Walter M. Weber, American Center for Law & Justice, Alexandria, VA, for the plaintiff-appellant.

Mary Ellen Simonson, Lewis & Roca, Phoenix, AR, for the defendants-appellees.

C.N. Coby Cohen, Perkins Coie, Seattle, WA, for Amicus Anti-Defamation League.

Appeal from the United States District Court for the District of Arizona; Susan R. Bolton, District Judge, Presiding. D.C. No. CV-00-01087-SRB.

Before *CANBY, HAWKINS*, and *BERZON*, Circuit Judges.

OPINION

PER CURIAM.

In this case, we again confront the often confusing intersection of First Amendment rights and the delicate balance which must be struck by our public schools in insuring the right to Free Speech but avoiding endorsement of religion in violation of the Establishment Clause. Striking this balance has never been easy and this appeal demonstrates just how difficult it can be.

Joseph Hills appeals the district court's grant of summary judgment to defendant Scottsdale Unified School District (the "District"). The District permits nonprofit organizations to distribute literature through its schools, promoting events and activities of interest to students, but prohibits any flyers of a "commercial, political or religious nature." After some back and forth, the District ultimately refused to distribute Hills's brochure for a summer camp that included, among nineteen course offerings, two classes on "Bible Heroes" and "Bible Tales." Application of Supreme Court precedent requires the conclusion that the District discriminated against Hills on the basis of his religious viewpoint, and requires us to hold that the District violated Hills's First Amendment rights by denying him equal access to the District's schools.

BACKGROUND

The District has a policy and practice of allowing certain outside groups to distribute or display brochures and other promotional literature to its students. Permitted brochures are either made available for students to pick up or placed in teachers' in-house mailboxes and then

distributed by the teachers to their students. The assistant superintendent explained the purpose of permitting flyer distribution as a "community service" for parents and children, getting information to those who would be most interested in participating. Examples of acceptable flyers included those promoting summer camps, art classes, sports leagues, artistic performances or exhibits, and various YMCA, boys and girls clubs, and scouting activities.

The official policy regarding the distribution and display of promotional activities provided:

> Outside agencies must receive District Approval by the Superintendent or designee prior to distribution or display of any materials.
>
> *Non-school originated material of a commercial, political or religious nature shall not be displayed at a school office.* Material from community organizations or of a general nature that is not of a commercial, political or religious nature may be displayed at the school at the discretion of the principal, prior to its being displayed.[1]

(emphasis added). In addition to these limitations, in 1998 the District decided that only literature from nonprofit groups and government entities would be eligible for distribution.

Hills, an individual with experience teaching afterschool programs and summer camps, decided to offer a

---

[1] Although the second paragraph refers only to materials being "displayed," the parties agree that the same policy was applied to materials that were to be distributed within the schools.

nonprofit summer camp called the "Desert Mountain Summer Camp," run by A Little Sonshine from Arizona, an Arizona nonprofit corporation of which Hills was president. He sought to advertise the camp by distributing a multi-page brochure to nine District elementary schools.

The brochure described nineteen courses that would be offered, including classes in camping, gymnastics, golf, and elementary Spanish. There were also two classes entitled "Bible Heroes" and "Bible Tales." The course description for Bible Heroes read as follows:

> Did you know . . . some of the greatest people who ever lived never had a home-run record? Never flew a plane or rode a train? Never starred in a motion picture (except Moses), and still do not have a Monday holiday named after them? It's true! Come, take an adventurous ride back into time with us, and learn about some ordinary people whose faith in GOD helped them accomplish extraordinary things! Remember Noah? Just how does a man build a boat that big? And Moses . . . he gives a whole new meaning to the phrase "You da Man!" We will explore Bible heroes from both the Old and New Testaments, and of course we will learn about our Greatest example JESUS. We will explore this through play acting, and puppetry, costuming, and set design, make-up and surely we will learn our lines! Come, join us in the Word, and learn what we mean by "role model."

The course description for the Bible Tales class stated:

> We at Desert Mountain Summer Camp believe in a little something for everybody! That's why we have created this version of our Bible Heroes for the little Guys and Gals! Did you know that if a

> child does not come to the knowledge of JESUS CHRIST and learn of the importance of Bible reading by the age 12 chances are slim that they ever will in this life? We think it is important to start as young as possible! We will Sing, Act, Dance and Relive some [of] the Greatest stories ever told! And maybe . . . we'll even have a surprise visit from Bob the Tomato and Larry the Cucumber, the award winning "Veggie-Tales" guys! (so much for the surprise!)

Following these course descriptions was a note which stated: "[T]hese classes are Non-denominational in nature. All Faiths are Welcome."

Hills's brochure was initially approved for distribution by district officials. Following a parental complaint, however, district officials decided to stop distributing the camp brochure. A few days later, Hills was permitted to resume distributing the brochure so long as it contained the following disclaimer:

> The Scottsdale Unified School District neither endorses nor sponsors the organization or activity represented in this document. The distribution of this material is provided as a community service.[2]

The District then reversed course, telling Hills he would not be allowed to distribute the brochures even with the disclaimer. One week later, the District agreed Hills could finish distributing the brochures as long as the disclaimer was included. Another week passed and the

---

[2] All flyers are now required to contain this disclaimer.

District changed its mind again and rescinded permission, concluding it was necessary to maintain a consistent legal position in administration of the literature distribution program and to avoid a possible Establishment Clause violation.

Hills was also told that he could resubmit his brochure and that it would be acceptable if he would remove descriptions of the Bible classes, change the spelling of "Sonshine" to "Sunshine," omit graphics of the Bible, cross and dove, and incorporate the disclaimer into the brochure.[3] Hills elected not to revise his brochure and instead brought suit in district court, alleging violations of his right to Free Speech, Free Exercise of Religion, Equal Protection and Due Process. Both parties moved for summary judgment, and the district court granted summary judgment to the District on all claims. We review the district court's grant of summary judgment de novo. *Everhart v. Allmerica Financial Life Ins. Co.,* 275 F.3d 751, 753 (9th Cir.2001), *cert. denied,* 536 U.S. 958, 122 S.Ct. 2662, 153 L.Ed.2d 836 (2002).

DISCUSSION

I. Free Speech

Hills's principal complaint is that the District's policy violates his right to Free Speech under the First Amendment. To analyze his claim, we must first consider what type of forum the District has created.

---

[3] At argument, the District asserted that it might have excluded the brochure even if it simply said "Bible Study," if the class was not being taught as a "historical, academic subject."

A. *Public v. Non-Public Forum*

In evaluating restrictions on speech, different standards apply depending on the type of forum involved. *See Perry Ed. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). In a traditional public forum, such as a park or sidewalk, restrictions on speech are subject to strict scrutiny and regulations must be "narrowly drawn to achieve a compelling state interest." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). When a nontraditional forum is intentionally opened for public discourse, it creates a designated public forum, *see Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 976 (9th Cir.1998), and restrictions are analyzed with the same strict scrutiny as traditional public fora. *See Perry,* 460 U.S. at 46, 103 S.Ct. 948.

All remaining property is nonpublic fora. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 965 (9th Cir.1999). The government may, however, create a "limited public forum" by intentionally opening a nonpublic forum to certain groups or topics. *Id.* In such a case, restrictions are permissible if they are viewpoint neutral and reasonable in light of the purpose served by the forum. *Id.; see also Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

In considering whether a designated public forum has been created, we look to "the policy and practice of the government, the nature of the property and its compatibility with expressive activity and whether the forum was designed and dedicated to expressive activities." *Children of the Rosary,* 154 F.3d at 976. In this case, the relevant

"forum" is the District's literature distribution program, and we agree with the District that this is properly considered a limited public forum.

In *DiLoreto,* we determined that a high school baseball field fence opened for commercial advertising was not intended to create a forum for unlimited public expression. 196 F.3d at 966-67. We emphasized that the school district screened and rejected ads for various reasons, including their religious content or controversial nature (such as alcohol or Planned Parenthood). *Id.; see also Children of the Rosary,* 154 F.3d at 977-78 (practice of restricting political and religious advertising on city buses created nonpublic forum). Likewise, in this case, the District has always restricted the availability of the program, prohibiting materials that are of a "commercial, political or religious" nature. The District has always screened submissions for suitability and frequently rejected flyers for various reasons. Thus, as in *DiLoreto,* the District's policies and practices indicate a lack of intent to designate a forum for all expressive activity. 196 F.3d at 965-67.

Moreover, it does not appear the forum was "designed for and dedicated to expressive activities." *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 802-03, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). In this case, the forum was not open to all expression or even all groups, but only to nonprofit organizations promoting activities of interest to schoolchildren that are not commercial, political or religious. The forum is therefore not open for indiscriminate use by part or all of the general public. Indeed, the nature of the property and its compatibility with expressive activity counsels against finding that the District created a designated public forum. *See Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 270-73, 108 S.Ct.

562, 98 L.Ed.2d 592 (1988) (noting unique attributes of school environment and broad purposes for which facilities may properly be reserved).

In making a forum type determination, it is important to separate the question of the propriety of the exclusion (discussed in more detail below) from the meaning of the exclusion in terms of the intent and scope of the forum. "The decision of the Government to limit access to the [forum] is not dispositive in itself; instead it is relevant for what it suggests about the Government's intent in creating the forum." *Cornelius,* 473 U.S. at 805, 105 S.Ct. 3439; *see also DiLoreto,* 196 F.3d at 967. In this case, the forum guidelines and the policies of the District suggest that it did not intend to open the school doors for indiscriminate use by all or part of the general public. Therefore, we proceed to analyze Hills's claim under the test for a limited public forum.

B. *Viewpoint Discrimination*

Restrictions on speech in the context of a limited public forum must be both viewpoint neutral and reasonable in light of the purpose served by the forum. *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510. As applied to Hills's brochure,[4] the District's policy violates the first requirement: The District is engaging in precisely the type of viewpoint discrimination that is forbidden under recent

[4] We focus on Hills's "as applied" challenge to the District policy, as we have previously rejected the argument that excluding religion as a subject or category from a limited public forum always constitutes viewpoint discrimination. *DiLoreto,* 196 F.3d at 969.

precedents such as *Rosenberger* and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001).

In *Rosenberger*, the University of Virginia permitted reimbursements for expenditures by student groups "related to the educational purpose" of the University, including "student news, information, opinion, entertainment, or academic communications media groups." 515 U.S. at 824, 115 S.Ct. 2510. The University, however, excluded "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses." *Id.* at 825, 115 S.Ct. 2510. "Religious activity" was defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* Applying the definition, the University declined to reimburse the student publication "Wide Awake," which addressed community issues such as racism, stress and pregnancy from a Christian perspective. *Id.* at 825-27, 115 S.Ct. 2510.

The Supreme Court analyzed the case as involving a limited public forum, and recognized that content discrimination would be permissible if it preserved the purpose of the limited forum. *Id.* at 829-30, 115 S.Ct. 2510. Although the University contended it was drawing lines based on content, the Court held that "viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake." *Id.* at 831, 115 S.Ct. 2510. The Court explained that the very terms of the guidelines did not exclude religion as subject matter, but disfavored the religious perspective, concluding that "the prohibited perspective, not the general subject matter" resulted in the

disqualification for reimbursements, as "the subjects discussed were otherwise within the approved category of publications." *Id.*

Following *Rosenberger,* the Supreme Court more recently held that if a school opened its doors to groups that "promote the moral and character development of children," it could not exclude religious groups. *Good News Club,* 533 U.S. at 108, 112, 121 S.Ct. 2093. The Court noted that simply because something is "decidedly religious in nature" does not mean that it could not also be properly characterized as teaching morals and character from a particular perspective. *Id.* at 111, 121 S.Ct. 2093. The Court thus reaffirmed *Rosenberger* that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 112, 121 S.Ct. 2093.

Following these cases, we recently held that a restriction on access to school facilities and equipment for religious clubs constituted impermissible viewpoint discrimination. *Prince v. Jacoby,* 303 F.3d 1074, 1091-92 (9th Cir.2002). We emphasized that the purpose of the school's forum was quite broad – it permitted access to groups that engage in "any lawful activity which promotes the academic, vocational, personal, or social/civil/cultural growth of students." *Id.* We therefore concluded that the school district could not then prevent the World Changers Club from teaching students "leadership and responsibility through the teaching of Jesus Christ and the Bible," as the club was essentially addressing otherwise permissible subjects from a religious standpoint. *Id.* at 1092.

In particular, we concluded that under the Equal Access Act, the World Changers Club must receive equal access to the school's public address and bulletin board systems in order to publicize information about its events, as long as it did not use this opportunity to "pray and proselytize." *Id.* at 1087. Because the neutrality and nondiscrimination policies in the Equal Access Act are largely coextensive the First Amendment requirements, *id.* at 1080; *Bd. of Educ. of Westside Cmty. Sch. v. Mergens,* 496 U.S. 226, 235, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), that holding is pertinent in this context as well. *See also Mergens,* 496 U.S. at 247, 110 S.Ct. 2356 (Christian club must be given "access to the school newspaper, bulletin boards, the public address system, and the Annual Club Fair" on the same basis as other clubs).

These cases control the result here also. The District created a forum with a broad purpose. Various school officials testified in depositions that the purpose of the forum was to provide a "community service" by notifying students and their parents of extra-curricular activities or issues of general interest to students. Summer camps clearly fall within the wide range of activities "of interest to schoolchildren" and, indeed, flyers promoting summer camps were routinely approved by the District. The District's objection, of course, was not to all of Hills's summer camp, but to the two classes which taught the Bible from a Christian perspective. The District argues that it is permitted to discriminate on the basis of subject matter, and that because it rejects all material of a "religious nature," there is no First Amendment violation here. In *Rosenberger,* the Supreme Court did recognize that in the context of a limited public forum, content discrimination may be permissible *if* it preserves the purposes of that

limited forum. 515 U.S. at 830, 115 S.Ct. 2510. But the Court also stressed that viewpoint discrimination is *not* permissible when it is directed at speech otherwise falling within the forum's limitations. *Id.* at 830, 115 S.Ct. 2510.

The District argues that *Rosenberger* and *Good News Club* involved speech on "an otherwise permissible subject," such as instruction in moral and character development, whereas, in its view, Hills's classes on the Bible do not relate to "permissible subject matter," because the District's policy expressly excluded materials of a religious nature. But the terms of the District's policy cannot set this case apart from *Rosenberger* and *Good News Club:* the reimbursement policy in *Rosenberger* also excluded "religious activities," 515 U.S. at 825, 115 S.Ct. 2510, and the access policy in *Good News Club* excluded use for "religious purposes." 533 U.S. at 103, 121 S.Ct. 2093. We must instead look to the underlying purposes of the forum, and determine whether the rejected speech discussed otherwise permissible subjects from a religious viewpoint. *See id.* at 112, 121 S.Ct. 2093.

Moreover, the District not only concedes that summer camps are an otherwise permissible subject, but also concedes that the Bible could be a permissible subject, so long as it were taught as history or literature. This simply confirms Hills's argument that it is his particular viewpoint on the subject that caused the District to reject his brochure. The refusal to allow Hills to advertise his summer camp thus runs afoul of Supreme Court instruction: "That all religions and all uses for religious purposes are treated alike . . . does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views . . . except those dealing with the subject matter

from a religious standpoint." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (holding it is viewpoint discrimination to prohibit the use of school facilities for a film on family values from a religious viewpoint). Premising refusal of permission to advertise an event or class based on the religious nature of the event or class cannot be justified under our precedents, where other similar groups can advertise events or classes similar except for their lack of religious viewpoint.

Good News Club teaches that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum simply because the subject is discussed from a religious viewpoint. 533 U.S. at 112, 121 S.Ct. 2093. The District's exclusion of Hills's summer camp brochure because it offered Bible classes from a Christian perspective does just that, and therefore constitutes impermissible viewpoint discrimination.

If an organization proposes to advertise an otherwise permissible type of extra-curricular event, it must be allowed to do so, even if the event is obviously cast from a particular religious viewpoint (so long as all such viewpoints are treated even-handedly). *Prince* so indicated by requiring the school district in that case to permit announcement of the World Changers Club meetings during school time, using school facilities. 303 F.3d at 1094. Thus, for example, we believe the District's policy could validly exclude a "religious tract" aimed at converting students to a particular belief, because the school's forum was never opened for pure discourse. We doubt, however, that the policy could exclude advertisements of a local Passover Seder or a Christmas performance of Handel's Messiah, as

these are extra-curricular activities that would no doubt be "of interest" to many schoolchildren.

We do not, however, mean to suggest that the District must distribute Hills's brochure as it was originally proposed.[5] The District believed that all of the Bible course descriptions had to be excised, along with any religious symbols, because these indicated that the Bible would be taught from a Christian viewpoint. As discussed above, this premise constitutes viewpoint discrimination. However, because the District has created only a limited public forum, it could still exercise some control over the content of Hills's brochure, to the extent that some of the language in the proposed brochure exceeds the scope of the District's forum.

For example, Hills's brochure contained the language "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!" This language was promotional not only of the class but of religion, and went beyond a description of the organization's general religious mission to directly exhort the reader to involve children in religious observance. We stated in *Prince* that the World Changers Club could announce its meetings using the school's facilities but could not in so doing "pray and proselytize." 303 F.3d at 1087. Likewise, the District is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this

[5] Indeed, Hills does not specifically seek such a remedy.

exceeds the purpose of the forum the District created.[6] Exclusion of such material would not be based on viewpoint, but on subject matter. In other words, the District cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that *itself* contains proselytizing language. The difference is subtle, but important.

Because the District took the position that Hills had to delete the Bible course descriptions in their entirety (and that even that might not be enough), we are not called upon in this case to parse each individual line in Hills's brochure. We thus hold only that if the District permits the distribution of similar secular programs by other non-profit organizations, then the District cannot refuse to distribute literature advertising an off-campus summer program because it is taught from a Christian perspective.

C. *Establishment Clause Defense*

The District argues its policy is not only permissible, but actually required in order to comply with the Establishment Clause. We have recognized that Establishment Clause concerns can justify speech restrictions "in order to avoid the appearance of government sponsorship of religion." *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d

[6] This particular language might also present Establishment Clause concerns; however, because we do not need to address the specific content of Hills's brochure to determine that viewpoint discrimination occurred, we do not reach this question.

979, 983-85 (9th Cir.2003); *see also Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103-05 (9th Cir.2000); *Prince*, 303 F.3d at 1082.[7] The District has not, however, demonstrated that the Establishment Clause would be violated if it permitted distribution of literature that advertised religious programs or events.

The District first argues that the impressionability of elementary-age students mandates exclusion of such material. Although some cases have recognized the particular impressionability of young students, this factor is far from dispositive. In *Good News Club*, the Court dismissed the argument that young children would feel coercive pressure to participate in the religious club or feel that the school was somehow endorsing it. 533 U.S. at 113-15, 121 S.Ct. 2093; *see also id.* at 119, 121 S.Ct. 2093 ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.") The Court noted that *parents* would choose the activities their children would attend and that there would be no

[7] The Supreme Court observes in *Good News Club* that the question "whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination" is an open one. 533 U.S. at 113, 121 S.Ct. 2093. The cases cited in the text, however, indicate the question is not open in this court, as we have upheld exclusions of religious speech in public fora. *See Cole*, 228 F.3d at 1101 (assuming without deciding that graduation ceremony was a public forum). To be sure, the question whether a forum is public significantly overlaps with the question whether the speech bears the imprimatur of the government such that Establishment Clause concerns are sufficiently implicated to justify viewpoint discrimination. *Cole* and *Lassonde* establish, however, that the questions are not identical.

reasonable likelihood the parents would believe the school was endorsing religion. *Id.* at 115, 121 S.Ct. 2093. Similarly, in this case, the brochures are sent home with students so that their parents can select extra-curricular activities for their children. Indeed, there is even less danger of a perception of "endorsement" for materials containing an express disclaimer that the school does not endorse or sponsor the organization promoting the activity. *See Prince,* 303 F.3d at 1094 (noting that district can dispel any "mistaken inference of endorsement" by making it clear to students that private speech is not the speech of the school).[8]

Good News Club also stressed that the after-school religious instruction was conducted by individuals who were not schoolteachers and only to those children who received parental consent. 533 U.S. at 117-18, 121 S.Ct. 2093. Again, there is even less danger of the perception of endorsement in this case because the promoted activity would not even take place on school property, much less during school hours. Although the District voices concern because the flyers are sometimes handed out to students at the end of the day – thus technically "during school hours" – they are certainly not part of the teacher's instruction or curriculum. Moreover, recent decisions have

---

[8] We recently held in *Lassonde* that a disclaimer was not sufficient to alleviate Establishment Clause concerns in the graduation speech context. 320 F.3d 979, 984 (9th Cir.2003). *Lassonde,* however, involved a decidedly different context – participation in a graduation exercise – in which the possibility that the speech bears the imprimatur of the school is heightened. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *see also Good News Club,* 533 U.S. at 115-16, 121 S.Ct. 2093 (distinguishing *Lee*).

placed no emphasis on whether access occurs during school hours. *See Prince,* 303 F.3d at 1077; *see id.* at 1094-97 (Hall, concurring) (responding to dissent's argument that equal treatment during school hours would violate Establishment Clause). Indeed, the Supreme Court counseled in *Good News Club* that "the school could not deny equal access . . . for any time that is generally available for public use." 533 U.S. at 114 n. 5, 121 S.Ct. 2093.

The District also argues that the Establishment Clause could be violated because in some schools the teachers hand the flyers directly to the students. In *Culbertson v. Oakridge School District,* 258 F.3d 1061, 1065 (9th Cir.2001), we recognized that the local Good News Club should be afforded equal access to the school building, but modified an injunction requiring the district to treat the club's permission slips in the same way as other non-school groups – having teachers hand permission slips directly to students. In *Culbertson*, we explained that requiring teachers to distribute permission slips "puts the teachers at the service of the club" and overstepped the line between neutrality and endorsement. *Id. Culbertson,* however, is distinguishable in a variety of ways, because in this case the underlying activity is not occurring on school grounds, the school is not handling the permission process, and the brochure contained an express disclaimer that the activity was not endorsed by the school. Moreover, in *Culbertson*, both brochures about the club *and* parental permission slips were distributed by teachers, but the opinion only modified the injunction with respect to the permission slips. *Id.* at 1064-65. Thus,

nothing in *Culbertson* suggests that handing students brochures about an off-campus activity violates the Establishment Clause.[9]

The Seventh Circuit reached a similar result in an Establishment Clause challenge to a school's literature distribution program which permitted the Boy Scouts of America, as well as numerous secular organizations, to distribute brochures and put up posters at the school. *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township,* 8 F.3d 1160 (7th Cir.1993). Similar to the District's forum, the program permitted distribution or display of materials if coming from a non-profit organization that provided a community service or offered youth-oriented activities. *Id.* at 1163. *Sherman* concluded that the minimal involvement of teachers in distributing Boy Scout brochures during school hours or the placement of Boy Scout posters throughout the school did not create an Establishment Clause violation in light of the many factors which mitigated Establishment Clause concerns. *Id.* at 1166. For example, as in this case, flyers from numerous organizations were distributed simultaneously, the information in the flyers was not discussed or incorporated into the curriculum, and the school did not draw special attention to any particular group or assume responsibility for the content of group handouts or meetings. *Id.*

---

[9] Even if *Culbertson* indicates that it would be problematic for the teachers to hand the brochures directly to students, it does not stand for the proposition that it is an Establishment Clause violation for the brochures to be generally available to students in some other manner.

We are mindful that school districts today confront many difficult choices when navigating the sometimes fine line between permitting free speech and avoiding the pitfalls of the Establishment Clause. Schools, however, "do not endorse everything they fail to censor." *Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality). Although it is desirable to avoid the perception of endorsement of religion, "there are countervailing constitutional concerns related to rights of other individuals in the community," *Good News Club,* 533 U.S. at 119, 121 S.Ct. 2093, which cannot be ignored. We agree with the Seventh Circuit that the desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but that instead it is

> [f]ar better to teach [students] about the first amendment, about the difference between private and public action, about why we tolerate divergent views. . . . The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the [ ] schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299-1300 (7th Cir.1993).

In sum, neither the age of the schoolchildren nor the time and manner of flyer distribution requires the District to exclude the brochure or run afoul of the Establishment Clause. Similar Establishment Clause defenses have been

raised and rejected by the Supreme Court in recent equal access cases. *See Good News Club,* 533 U.S. at 113, 121 S.Ct. 2093 (noting the Court had rejected similar defenses in other Free Speech cases such as *Lamb's Chapel* and *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)). The perception of endorsement of religion is even less likely in this case, because of the express disclaimers that the activity is not school-sponsored and because the activity would not even occur on school grounds.

When the District denied Hills access to the school's limited public forum, it discriminated against him because of religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because the District has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse the District's viewpoint discrimination.[10]

II. Vagueness

Hills also contends that the District's policy is not only unconstitutional as applied, but that it is unconstitutionally vague because it gives government officials "unbridled discretion" to determine what is or is not forbidden "religious" speech. A policy can be unconstitutionally vague if the standard (or lack thereof) creates the danger of

---

[10] Because we hold that Hills is entitled to relief on his claim under the Free Speech Clause, we do not address his additional arguments that the District also violated his rights under the Free Exercise Clause, the Establishment Clause and the Equal Protection Clause. Hills's argument that the district court abused its discretion by denying his motion to supplement the record is dismissed as moot.

viewpoint discrimination; this is true even if there is no sanction or penalty imposed on the speaker. *See Children of the Rosary,* 154 F.3d at 983; *see also Forsyth County Georgia v. Nationalist Movement,* 505 U.S. 123, 133-34, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (invalidating wholly discretionary fee and permit process).

The District's policy is not vague because the regulations are sufficiently clear that persons of ordinary intelligence can determine what is prohibited. *See California Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1152 (9th Cir.2001) (finding statute using "words of common understanding" not unconstitutionally vague). Although District officials did vary somewhat in their deposition testimony as to what would be excluded under the policy, that there may be some "close cases" or difficult decisions does not render a policy unconstitutionally vague. *See id.* (uncertainty at the margins will not warrant facial invalidation if it is clear what the statute proscribes in majority of its intended applications). Although not perfectly clear, the term "religious" is a common term and does at least provide some degree of constraint on the District. *See Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). We cannot say that the District's policy is facially void for vagueness. As discussed above, however, the policy still must be applied in a viewpoint neutral manner.

CONCLUSION

Because the District has violated Hills's rights under the Free Speech Clause of the First Amendment, the

judgment of the district court is REVERSED and this case is REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH J. HILLS,

Plaintiff-Appellant,

v.

SCOTTSDALE UNIFIED SCHOOL DISTRICT, No. 48, BARBARA F. ERWIN, in her official capacity as Scottsdale Unified School District Superintendent; JANE MCGLOTHLIN, in her official capacity as Scottsdale Unified School District Assistant Superintendent; BOBBIE SFERRA, in her official capacity as Scottsdale Unified School District Assistant Superintendent; LISA MARTENS, in her official capacity as District Communications Specialist,

Defendants-Appellees.

No. 01-17518

D.C. No. CV-00-01087-SRB (District of Arizona, Phoenix)

ORDER

(Filed Jul. 9, 2003)

Before: CANBY, HAWKINS and BERZON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Canby has recommended denying the petition for rehearing en banc and Judges Hawkins and Berzon have voted to deny the en banc petition.

The full court has been advised of the petition for rehearing en banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOSEPH J. HILLS, Plaintiff, vs. SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48, et al., Defendants.	No. CIV 00-1087-PHX-SRB **ORDER** (Filed Nov. 5, 2001)

Pending before the Court are the Defendants' Motion for Summary Judgment, the Plaintiff's Motion for Summary Judgment, and the Plaintiff's Motion to Supplement the Record. The Court now rules on the motions. (Docs. 51-1, 55-1, 80-1).

I. BACKGROUND

Scottsdale Unified School District allows the distribution of literature to elementary school students on a limited basis. The school policy allows distribution of literature which informs the students of community activities that might be of interest to the students. However, it excludes all material of a commercial, political, or religious nature. Approved literature is distributed to the students by teachers in the classrooms.

The Plaintiff is the president of "A Little Sonshine from Arizona." The Plaintiff sought access to the literature distribution program as a means to advertise "Desert Mountain Camp," a Christian summer camp. On

April 10, 2000, the Plaintiff submitted a camp brochure and flyer for inclusion in the school literature distribution program.

The Plaintiff's brochure was initially approved for distribution and distributed through the literature distribution program. On April 12, 2000, a parent called the school district and complained about the religious content contained within the Plaintiff's brochure. The school district suspended further distribution of the brochure pending investigation of the matter. After reviewing the brochure, the superintendent of the school district concluded that the religious content in the brochure violated the district policy prohibition on display and distribution of material of a religious nature. School officials were advised to discontinue distribution of the brochure.

After some negotiation between the Plaintiff's attorney and the school officials, the Plaintiff was initially advised that he could distribute the brochure as long as it contained a disclaimer which stated that distribution of the material is offered as a "community service" and that "the school district does not endorse or sponsor the organizations represented in this document." However, on May 12, 2000, the school district informed the Plaintiff that he would not be allowed to distribute the brochure. The school district stated that they believed it was important to maintain a consistent position with respect to administration of the literature distribution program and avoid a possible establishment clause violation.

On June 8, 2000, the Plaintiff filed a Complaint alleging that the Defendants' policy and refusal to

distribute the summer camp brochure violated his constitutional rights. On March 15, 2001, the parties filed cross-motions for summary judgment. The Court heard oral argument on the motions on May 14, 2001. On September 10, 2001, the Plaintiff filed a Motion to Supplement the Record.

II. LEGAL STANDARD AND ANALYSIS

As a preliminary manner the Court will address the Plaintiff's Motion to Supplement the Record. Having reviewed the parties' briefs and the materials submitted by the Plaintiff, the Court finds that the supplemental material submitted by the Plaintiff is not relevant to the issues before this Court. The court will not rely on irrelevant material in its determination of the parties pending motions for summary judgment. The Plaintiff's Motion to Supplement the Record is denied.

Next the Court will address the parties' cross-motions for summary judgment. The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under this rule, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of demonstrating that it is entitled to summary judgment. *Murray Mgmt. Corp. v. Founders Title Co.*, 819 P.2d 1003, 1005

(9th Cir. 1991). If the moving party makes a prima facie showing that no genuine issue of material fact exists, the burden then shifts to the opposing party to produce sufficient competent evidence to show that a triable issue of fact does remain. *Ancell v. United Station Assocs., Inc.*, 803 P.2d 450, 452 (9th Cir. 1990).

The Court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings, it must produce some significant probative evidence tending to contradict the moving party's allegations and thereby creating a material question of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2513-14 (1986) (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592 (1968).

The Court will first address the Plaintiff's claim that the school district's refusal to distribute his brochure violates his First Amendment right to free speech. The extent to which the government may limit speech in a particular forum depends upon whether the forum is public or non-public. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). If the forum is public, speakers can be excluded only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *Id.* If, on the other hand, the forum is non-public, the government is free to restrict access as long as the restrictions are reasonable, and are not an effort to suppress expression

merely because the government disagrees with the speaker's viewpoint. *Id.* Thus, the Court's initial task is to determine the nature of the forum at issue in this case.

The Plaintiff argues that by allowing the distribution of literature the Defendants have opened a designated public forum. The Defendants, however, argue that the school district's literature distribution program is a limited public forum.

When the government intentionally opens a nontraditional forum to public discourse it creates a "designated public forum." *Diloreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999). A "limited public forum" is created where the government opens a nontraditional forum only to certain groups or to certain topics. *Id.* If the forum at issue in this case is a designated public forum the Court must apply the "strict scrutiny" standard used in traditional public forum analysis. *Hopper*, 241 F.3d at 1075. If, however, it is a limited public forum then the lower "reasonableness" standard applies. *Id.*

The intent of the government is the essential question in determining whether or not a designated public forum has been established. *Hopper*, 241 F.3d at 1075. In order to ascertain intent, the Court must examine the nature of the forum and its compatibility with expressive activity as well as the government's past policy and practice. *Id.*; *accord Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 US. 788, 802, 105 S.Ct. 3439, 3439 (1985). The Court must also examine the selectivity with which the forum was open to particular forms of expression. *Hopper*, 241 F.3d at 1078. The more restrictive the

criteria for admission and the more control placed on access to the forum, the less likely it is that the forum will be deemed a designated public forum for First Amendment purposes. *Id.*

In this case, the school district's policy allows the distribution of literature by nonprofit organizations and governmental agencies. The policy prohibits material of a commercial, political, or religious nature from being displayed or distributed. The policy requires the "superintendent or designee" to review and approve all material prior to distribution or display. The policy itself, which on its face clearly indicates an intent to limit access to the forum and reserve it for a specified purpose, suggests that the school district did not intend to create a designated public forum. *See Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 823-24 (9th Cir. 1991) (finding that the school district's written policies explicitly reserving right to control content most clearly evidenced school district's intent).

The Plaintiff argues that, notwithstanding the written policy, the Defendants have a past practice of allowing religious content in the forum. As evidence, the Plaintiff points to the following flyers: (1) St. Theresa Fall Festival; (2) Hypnotist Session and Teen Mass sponsored by St. Mary's Catholic Church; (3) Boys and Girls Club Summer Camp brochure; (5) Kerr Kalendar; (6) American Legion Halloween Brochure; and (7) various YMCA flyers. There is no evidence that the Teen Mass flyer was ever distributed, therefore, the Court will disregard it. The Court has carefully reviewed the remaining flyers and despite the Plaintiff's assertions finds that they do not contain any religious content.

The St. Theresa flyer does not contain religious content merely because it states that a fall festival will be held at the "Saint Theresa Catholic School." Likewise, materials submitted by the YMCA are not religious in nature simply because the name of the organization has the word "Christian" in it, or the organization's mission is to put Christian principles into practice. Materials are not of a religious nature merely because they contain a graphic of a dove, or an angel. It is not the religious nature of the organization or the location of the activities that the policy prohibits, it is the religious nature of the literature that is to be distributed and the activities promoted therein.

As further evidence of the school district's policy and practice with respect to the forum the Plaintiff's provide: (1) a May 16, 2000 letter from the superintendent of the school district to a parent; (2) an internal memorandum from the assistant superintendent dated May 10, 2000; (3) an internal memorandum from the assistant superintendent dated May 16, 2000; (4) an internal memorandum from the superintendent to Jane McGlothlin dated April 18, 2000.

The Plaintiff directs the Court's attention to paragraph four of the April 18, 2000 memorandum from Superintendent Barbara Erwin, which states that Dr. Erwin reviewed the Plaintiff's brochure and she was "uncomfortable with the religious-themed classes" but felt that there "was a precedent" and that the camp fit the district's criteria of a non-profit organization. The Plaintiff suggests that this memorandum is evidence that the district has a past policy of distributing materials with religious content. However, this paragraph must be read in context.

The preceding paragraphs make it clear that the "precedent" Dr. Erwin refers to is that "non-profit religious groups have had their flyers approved in the past." According to the letter, Dr. Erwin feels uncomfortable distributing any materials by religious organizations, but believes that there is a precedent for allowing organizations, such as the YMCA, the Catholic Church School, etc., to take part in the literature distribution program.

Dr. Erwin does not suggest that there is a precedent for allowing religious content in the materials submitted by those organizations. To the contrary, she notes that prior to receiving approval for distribution of its "Fall Festival" materials, she required St. Theresa's Catholic Church School to make changes to its flyer. She also mentions another "Gremlyn" flyer which was distributed through the program was "very unacceptable" and opines that if they had more thoroughly reviewed the flyer prior to approval they would have noticed, and rejected, the flyer due to the language of the "Bible Offerings" section. This evidence is consistent with the Defendants' contentions that the school district fully intended to exclude all materials of a religious nature from its distribution program, and any materials with religious content that were distributed were the result of a mistake and should have been rejected according to the policy.

The remaining evidence presented by the Plaintiff is equally unhelpful to his position. The May 10, 2000 internal memorandum from Assistant Superintendent Bobby Sferra states that the Plaintiff's brochure has been approved for distribution by the district but that it must have a disclaimer on the flier or included with

distribution. It further states that the procedure on distribution of flyers will be reviewed and a new policy created during the coming summer.

The May 16, 2000 letter from Superintendent Barbara Erwin was directed to a parent who complained about the religious content of the Plaintiff's flyer. The memorandum states: "I couldn't agree with you more, that we should not pass flyers out with religious materials. We have *immediately* stopped that process."

The May 16, 2000 internal memorandum from Bobby Sferra was directed to all principals in the school district. The memorandum states that the district reconsidered its recent decision not to allow the distribution of any flyers pending the policy review which was to take place in the summer and the approved flyers could now be distributed providing that the flyer contains a disclaimer, and is first submitted to Lisa Martin for review and approved in a memorandum.

The above evidence merely attests to facts which are undisputed in this case. There is no dispute that the Plaintiff's brochure was initially approved for distribution and was distributed by the school district. There is no dispute that after a parent complained about the Plaintiff's brochure the school district took another look at the brochure and reconsidered whether the brochure violated its prohibition on religious content. There is no dispute that the district made some changes to its policies following these events. None of these facts suggest a past practice of allowing religious content into the literature distribution program.

There was clearly some confusion among district officials about whether they should suspend distribution

of the Plaintiff's flyer, allow it with a disclaimer, or suspend distribution of all flyers pending a review of the procedures governing the distribution of literature. However, this confusion is not inconsistent with an intent to enforce the policy prohibition on religious content. And it certainly does not demonstrate a past practice of allowing religious content into the forum or a clear intent to create a public forum with respect to the literature distribution program.

There are situations where the government creates a designated public forum by failing to enforce the restrictions that it has placed on the use of the forum. *See, e.g., Giebel v. Sylvester*, 244 F.3d 1182, 1187 (9th Cir. 2001); *Hopper*, 241 F.3d at 1075-77. Limited public forum status may be lost where policy restrictions, in practice, are not enforced, or exceptions are "haphazardly permitted." *Hopper*, 241 F.3d at 1076. However, such circumstances are not present in this case.

It cannot be said that the evidence presented by the Plaintiff demonstrates an intent to allow the public "indiscriminate use" of the literature distribution program. *See, e.g., Planned Parenthood*, 941 F.2d at 822 (school facilities reserved for their intended purpose, communicative or otherwise, may be deemed public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public). There is no evidence suggesting that material containing religious content or promoting religious classes made its way into the forum for any reason other than the school officials' inadvertent failure to determine that the flyer contained content which violated the policy before the materials were

distributed. Evidence of a couple of inadvertent mistakes are insufficient to infer that the policy prohibition on religious content, in practice, was not enforced and in reality was "no policy at all." *See Hopper*, 241 F.3d at 1076.

The government creates a designated public forum by *intending* to open the forum to public discourse. *See Cornelius*, 473 U.S. 802-03, 105 S.Ct. at 3449-50. The evidence does not support a finding of such intent. To the contrary, the evidence suggests that the school district had every intention of maintaining limited access to its literature distribution program based on the purpose of the program and the content proscribed by the policy. The evidence shows that the Defendants pre-screened all materials submitted for distribution for the express purpose of excluding content which violated the policy.

As the Plaintiff correctly pointed out in his brief, "designated public forums are areas created by the government for use by the public as places for expressive activity." Neither the Defendants' policy nor its practice is consistent with an intent to designate the literature distribution program as a public forum. Rather, it suggests that the school district intended to create a limited public forum.

An examination of the nature of the forum in question supports the conclusion that it is a limited public forum. Although the forum is the literature distribution program, rather than the school itself, the Court cannot ignore the special characteristics of the school environment when evaluating the suitability of the literature

distribution program as an avenue for expressive activity. *See, e.g., Cornelius*, 473 U.S. at 801-802, 105 S.Ct. at 3448-49. The school district's literature distribution program is intended to function as a means to inform student of community activities, not as a forum of unlimited public expression. The literature is distributed to elementary school students in the classrooms by teachers. Therefore, the Court should be "particularly reluctant" to hold that the Defendants intended to designate a public forum as unlimited expressive activity would foreseeably interfere with the school's primary function and educational mission. *See id.* at 804, 105 S.Ct. at 3450.

The Court finds that the Defendants created a nonpublic forum reserved for a limited purpose. Thus, the restrictions imposed by the Defendants are permissible if they are viewpoint neutral and reasonable in light of the purpose served by the forum and "all the surrounding circumstances." *Diloreto*, 196 F.3d at 967; *Planned Parenthood*, 941 F.2d at 822.

The Plaintiff argues that he is entitled to summary judgment because the Defendants engaged in impermissible viewpoint-based discrimination. The cases cited by the Plaintiff as authority for his position stand for the proposition that it would be unlawful viewpoint discrimination to exclude a religious perspective on a subject matter that is otherwise permissible in the forum. *See, e.g., Good News Club v. Milford Cent. Sch.*, ___ U.S. ___, ___, 121 S.Ct. 2093, 2100-01 (2001). The Plaintiff argues that the subject of morality and good character is a permissible subject of the forum. Thus, he concludes that the school district's failure to allow the brochure because it included classes about the Bible is

viewpoint discrimination. Alternatively, the Plaintiff argues that the school must allow the brochure because it advertises a permissible "activity of interest and benefit to the students" and exclusion based on the religious nature of the Plaintiff's organization would be viewpoint discrimination.

Contrary to the Plaintiff's contentions, the Plaintiff's brochure is not merely an "otherwise permissible" advertisement for a community activity. There is no dispute over the nature of the classes promoted by the Plaintiff's brochure. The Plaintiff conceded at oral argument that the purpose of the literature and the promoted activities, which is apparent on the face of the brochure, is specifically to get the students to come to know Jesus. The brochure encourages the viewing audience to: "Come, join us in the Word," and states: "Did you know that if a child does not come to the knowledge of Jesus Christ, and learn of the importance of Bible reading by the age 12 chances are slim that they ever will in this life? We think it is important to start as young as possible!" The subject of the promoted classes is not merely teaching morality and good character from a religious perspective by setting out Jesus or other bible heroes as examples or role models. Rather, the subject of the classes is that one must believe in Jesus and accept the Bible as truth. The content contained within the Plaintiff's brochure is not merely a religious viewpoint on a secular subject permitted in the forum, it is proselytizing on a subject that has been categorically excluded from the forum; religion.

Viewpoint discrimination is a form of content discrimination where the government targets particular views taken by speakers on a given subject. *Diloreto*,

196 F.3d at 969. There is no viewpoint discrimination where, as here, a subject matter is categorically excluded from the forum regardless of the particular stand that the speaker takes on the topic. *See id.* Thus, the Defendants' exclusion of the Plaintiff's brochure was permissible providing that the policy's restriction on materials containing religious content is reasonable.

The reasonableness of a particular restriction must be assessed in light of the purpose of the forum and all the surrounding circumstances. *Cornelius*, 473 U.S. at 809, 105 S.Ct. at 3452. When the forum in question exists within the context of a public school, courts must consider the unique aspects of the school environment and must recognize broadly articulated purposes for which educational facilities may properly be reserved. *Diloreto*, 196 F.3d at 966. This includes taking into account the schools pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is. *Id.* Even though the forum at issue in this case is the literature distribution program, rather than the school facilities, the special nature and function that schools serve are relevant to evaluating the limits that the Defendants may impose on expressive activity. *Id.* at 967.

Here, the Defendants have offered evidence that the school district prohibited religious, political, and commercial materials in its literature distribution in order to maintain neutrality, to avoid controversy, and to avoid the appearance of approving or disapproving any particular view on those issues. Given the nature and purpose of the

forum, these are legitimate reasons for excluding materials which contain religious content from the distribution program.

Educators have a right to control expressive activity that students, parents, and other members of the public might reasonably perceive to bear the imprimatur of the school. *Planned Parenthood*, 941 F.2d at 825. In this case there is no dispute that the literature at issue is handed out to the elementary school students by teachers. Members of the public, particularly the children and their parents, might reasonably attribute the content of the literature to the school district. The evidence suggests that this is exactly what happened in this case with the Plaintiff's brochure. The April 18, 2000 memorandum from Barbara Erwin to Jane McGlothlin notes that a parent complained about the religious content of the brochure believing the brochure implied that the Christian summer camp was run by either the school, or the school district.

The Defendants have a legitimate interest in assuring that the religious views of individual speakers are not erroneously attributed to the school district. *Planned Parenthood*, 941 F.2d at 828. School sponsorship of a religious message is impermissible because of the "ancillary message" that it sends to members of the viewing audience. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10, 120 S.Ct. 2266, 2279 (2000). In particular, sponsorship suggests to the public that adherents to that religion are "insiders, favored members of the political community," while nonadherents are not. *Id.* Such endorsement of religion is prohibited by the Establishment Clause. *Id.*

Additionally, the school district retains the authority to refuse to sponsor speech that might reasonably associate the school with any position other than neutrality on matters of political controversy. *Planned Parenthood*, 941 F.2d at 828. A school district's decision not to promote or sponsor speech which might place it on one side of a controversial issue is a decision that is afforded "substantial deference" by the courts. *Planned Parenthood*, 941 F.2d at 829; *see also Diloreto*, 196 F.3d at 968 (school district's concerns regarding disruption and avoiding controversy held to be legitimate reasons to restrict content of advertisements displayed in a public secondary school setting).

The school district's policy's prohibition on all religious content circumvents an establishment clause violation by avoiding any possible perception of school sponsorship of a particular religious viewpoint and allows the school to avoid controversy by maintaining its position of neutrality on religious matters. The Court finds that the limits placed on the content of the literature distribution program are reasonable in light of the nature and purpose of the forum. Because the policy's prohibition on religious content is reasonable and is not an effort at viewpoint discrimination, the Defendants are entitled to judgment as a matter of law with respect to the Plaintiff's free speech claim. *See Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2551-53 (one the defendant meets its initial burden of establishing the absence of genuine issues of material fact as to one or more essential elements of the plaintiff's claim, the plaintiff can withstand summary judgment only by making a showing sufficient to establish a genuine issue of material fact regarding each element of the claim); *Cant*

Strip Corp. of Am. v. Schuller Int'l, Inc, 1995 WL 767805, *3 (D. Ariz. 1995) (same).

Next the Court will consider the parties' arguments with respect to the Plaintiff's Equal Protection, Due Process, Free Exercise, Religious Freedom Restoration Act claims.

The Plaintiff argues that the policy violates the equal protection clause by denying him access to its forum, while allowing access to those with secular perspectives. The Defendants argue that the claim is duplicative of the Plaintiff's free speech claim, and fails for the same reasons. The Court agrees.

The strict scrutiny standard has sometimes been applied in Equal Protection Clause cases where First Amendment rights have been implicated due to content regulation. *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 327 (9th Cir. 1996) (discussing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384-85 n.4, 112 S.Ct. 2538, 2543-44 n.4 (1992)). However, the higher standard is triggered only after First Amendment analysis first determines that strict scrutiny is applicable. *Id.*; *Tipton v. Univ. of Haw.*, 15 F.3d 922, 924, 928 (9th Cir. 1994) (affirming the district court's holding that strict scrutiny did not apply to an equal protection claim where the policy at issue did not distinguish among particular religions). Although the policy in this case prohibits religious content, there is no evidence that the policy, or the school district, distinguished or discriminated against particular religious viewpoints. Therefore, the Plaintiff's Equal Protection claim is governed by the rational basis test. *Jones*, 80 F.3d at 327 (holding that rational basis test applied to establishment clause claim which was

predicated on a first amendment violation that was disposed of by the court); *Tipton*, 15 F.3d at 928. Because the evidence, when considered in the light most favorable to Plaintiff, established that there is a rational basis for the policy, the Defendants are entitled to summary judgment with respect to the Plaintiff's Equal Protection claim. *See Tipton*, 15 F.3d at 928 (affirming the district court's holding that a policy rational purpose of avoiding an Establishment Clause violation and threatened litigation precluded an equal protection violation).

The Plaintiff argues that the Defendants' policy violates the Due Process Clause and is unconstitutionally vague. The crux of the Plaintiff's argument is that the prohibition on materials "of a religious nature" is not specific enough to avoid arbitrary and discriminatory enforcement. The Plaintiff argues that school officials have come to "widely differing conclusion" as to what is prohibited by the policy. In support of his position, the Plaintiff points to the same flyers that he previously argued contain religious content but were included in the literature distribution program, as well as portions of the deposition transcripts of various school officials. The Defendants argue that the policy withstands a vagueness challenge because school officials and members of the public are able to make the determination whether materials violate the policy merely by exercising common sense.

Even when the challenge is based on the First Amendment, the overbreadth doctrine is not casually employed. *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39, 120 S.Ct. 483, 489 (1999). Rather, it is employed "with hesitation, and then only as a last resort." *Id.* None of the evidence set forth by the Plaintiff suggests that school officials applied the policy in

an arbitrary and discriminatory manner, or that school officials reached widely differing conclusions as to what was prohibited by the policy. The Court finds that the policy's prohibition on religious content is sufficiently clear to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited. *U.S. v. Makowski*, 120 F.3d 1078, 1080 (9th Cir. 1997) (discussing the requirements of the Due Process Clause). The Defendants' Motion for Summary Judgment will be granted with respect to the Plaintiff's Due Process claim.

The Plaintiff argues that the District's policy violates his First Amendment right to free exercise of religion. The asserted basis for the Plaintiff's free exercise claim is that the district's policy "discriminates" against religious materials and prevents him from proselytizing. The Court does not question the Plaintiff's assertion that he has a sincerely held religious belief that he must "proclaim the gospel of Jesus Christ." Nonetheless, the Plaintiff's thwarted desire to distribute brochures advertising such proselytizing classes is not sufficient to create a Free Exercise Clause violation. None of these allegations, even assuming their veracity, amount to a substantial burden on the free exercise of the Plaintiff's religion.

In order to reach the level of a constitutional violation, the interference with one's practice of religion "must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997); *Graham v. C.I.R.*, 822 F.2d 844, 851 (9th Cir.1987). Although the Defendants' policy may have inconvenienced the Plaintiff in the practice of his religion, there is no evidence that it prevented him from participating in the mandates of his religion. Summary

judgment will be granted with respect to the Plaintiff's Free Exercise and RFRA claims.

The Plaintiff has set forth no argument that in this case the Arizona Constitution provides him with greater protections then those afforded by the United States Constitution. Therefore, summary judgment will be granted in favor of the Defendants on the Plaintiff's state law claims as well.

IT IS ORDERED denying the Plaintiff's Motion to Supplement the Record. (Doc. 80-1).

IT IS FURTHER ORDERED denying the Plaintiff's Motion for Summary Judgment. (Doc. 51-1).

IT IS FURTHER ORDERED granting the Defendants' Motion for Summary Judgment. (Doc. 55-1). The clerk of the Court is directed to enter judgment in favor of the Defendants.

DATED this 2nd day of November, 2001.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph J. Hills, Plaintiff(s), Scottsdale Unified School District No. 48 et al., Defendant(s).	CIV 00-1087-PHX-SRB JUDGMENT (Filed Nov. 5, 2001)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

The Court has denied plaintiff's motion summary judgment and granted defendant's cross-motion for summary judgment; therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing and his complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, November 5, 2001,
RICHARD H. WEARE, Clerk of Court/DCE

/s/ S. Dorfman
S. Dorfman, Deputy Clerk

CIV-21 (7/94)

United States Constitution – Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

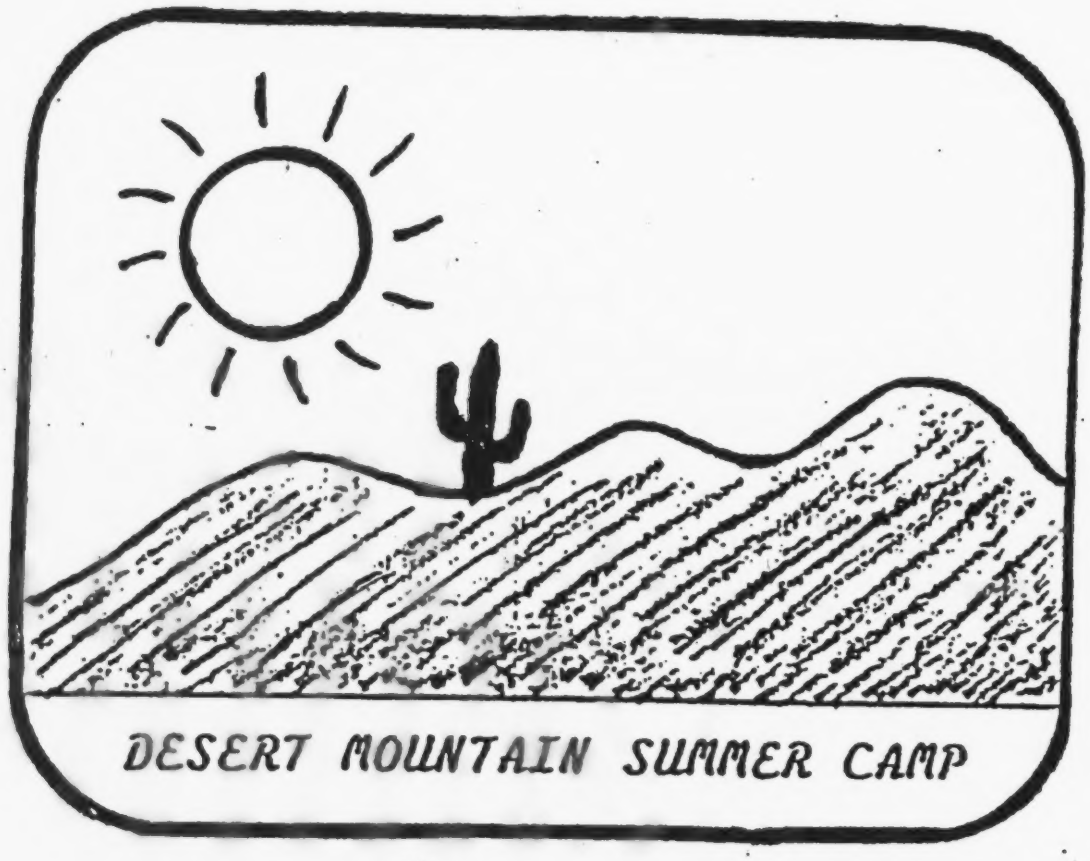
K-2300 **KHC**

DISTRIBUTION/POSTING OF PROMOTIONAL MATERIALS

Outside agencies must receive District approval by the Superintendent or designee prior to distribution or display of any materials.

Non-school-originated material of a commercial, political, or religious nature shall not be displayed at a school office. Material from community organizations or of a general nature that is not of a commercial, political, or religious nature may be displayed at the school at the discretion of the principal, prior to its being displayed.

Adopted: date of manual adoption



SUMMER 2000

Real Life Adventure

Presented by: Little Sonshine From Arizona

An Arizona Educational Non-profit Corp.

*Camp Location: ZUNI Elementary

92nd Street & T-Bird

HELLO FAMILIES!

Welcome to the Desert Mountain Summer Camp! T. ost talked about summer camp in Scottsdale! This year we have put together the Finest selection of summer activities available to both educate and entertain your youngsters. Additionally, we have drawn on the resources of local businesses, and community leaders , to come and present to our children some of their own "REAL LIFE ADVENTURES!". Please join us!

OUR MISSION

AT A LITTLE SONSHINE FROM ARIZONA, Our mission is to provide the highest degree of service in the best learning environment. We want to positively impact the lives of your children by modeling leadership through example, sharing real life experiences, and creatively helping them reach success.

OUR GOAL

We really do care about your children! It is therefore our goal to provide so much fun for your kids, that they just cannot wait to come back again!

OUR STAFF

We are blessed to have a "hand-picked" staff of Quality teachers who share a love for the children, and are dedicated to making the DESERT MOUNTAIN SUMMER CAMP the most successful experience your children will have this first summer of the New Millenium! We think you will agree, this is the finest group of people assembled! We'll see you this SUMMER!!

There are 4 sessions available this Summer 2000!

Session 1	MAY 30th	-	JUNE 9th
Session 2	JUNE 12th	-	JUNE 23rd
Session 3	JUNE 26th	-	JULY 7th
Session 4	JULY 10th	-	JULY 21st

*Each Session is 2 weeks long. MONDAY through FRIDAY

MORNING MENU OFFERRINGS.....$195. each Session
(9:00am-12:00pm)

1. a little Sonshine from Arizona-Preschool
2. Arizona Camping and Desert Survival
3. Bible Heroes
4. Bible Tales
5. Calling all American Girls!
6. Cater to the Kids!
7. Desert Mountain Junior Golf
8. Exploring with the Magic School Bus
9. Kinderprep
10. Let's Dance with LeAnna!
11. Picture the Moment
12. Rocket Science 101
13. Team Arizona - Sports Camp
14. Victorian Soap and Candle Making

AFTERNOON SPECIALS (see class description for times!)

15. Gymnastics with Miss Stephanie.....$105. each Session
16. Elementary Spanish.....$105
17. Martial Arts.....$105
18. Old West Leathercrafting.....$195
19. The Afternoon Workshop-Carpentry....$195

-ALA CARTE-

LUNCH BUNCH.....$15. EACH WEEK

What an excellent way for your child enjoy an extra hour each day with their new Camp friends! BRING YOUR OWN SACK LUNCH. Sodas, Juice, Water, Ice Pops, Cookies, Crackers & Cheese, Fruit and other <u>HEALTHY</u> snacks will be available @ Arizona Joe's Snack Bar!
Lunchtime 12noon-1pm

AFTERCARE.....$40. EACH WEEK
available from 1:00-4:00pm

Our Aftercare program is a Planned Activity Time! We will be doing something new each day with the children. Activities include: Story-time, Water FUN Day, Puppets, Balloon Animal Creations, and even Pizza! We will have the time of our life! Come join us, it's the BEST VALUE in after school care in town!!

<u>BONUS</u>: As a special <u>gift</u> to say THANKS! to all our Campers, everyone will get one of our SUMMER NEWCOMER PACKS! Chock full of Freebies, Discount Coupons for food and other cool stuff, Summer activities you name it! Thank <u>YOU</u>!!

a little Sonshine from Arizona-Preschool ... isn't this just sound like the cutest little class you have ever heard ?! That's because it is! When we created the recipe for this 3 and 4 year-old program, we started with a full serving of Love, equal parts of Kindness and Patience, and a helping of "hands-on" FUN!
In a separate bowl, mix in reading, puppetry, and cooking. Then for a dash of flavor add a sprinkle of woodworking, dance and desert safety! Combine all the ingredients of our best camps, and leave in a relaxing cool temperature for two weeks! This class is more fun than your preschooler can imagine.

Ages: 3 and 4 years old
Sessions: 1,2,3 & 4. Mornings 9:00am - 12:00noon

Bio: Instructor Paula Lukefahr is a teacher from Liberty Elementary School. She has worked in the Paradise Valley School District for 22 years, and is very active in Girl Scouting. Paula is soft spoken, and spilling over with kindness!

Arizona Camping and Desert Survival ...And in a related story, two hikers are missing in the Coconino wilderness...a family spokesperson says they were carrying only one water bottle for the two, and they were wearing only shorts and a t-shirt each...tonight's forecast rain, next in Weather!
This doesn't have to be you! Arizona camping and desert survival is a "life skills" course, and a must for everyone! Come experience the fun of planning camping trips. Learn to make the right choices in equipment, and how to pack a backpack. Set up your own campsite, cook for both camp and survival, and discuss hygiene and water purification. We'll even track the weather, and most important: SAFETY and FIRST AID. This course will also feature guest speakers from the Arizona Game and Fish and local Outfitters! What would you do if you were lost in the wilderness?...This course could save your life!!

Ages: K-8th
Sessions: 1,2,3 & 4. Mornings 9:00am - 12:00noon

Bio: Instructor Mr. David Sayer is an Experienced and avid outdoorsman. Most weekends you will find him exploring some unknown canyon, or climbing the face of some rugged Arizona mountain! In David's words: "the outdoors helps me appreciate the diverse landscape within myself!"

Bible Heroes Did you know... Some of the greatest people who ever lived never had a home-run record? Never flew a plane or rode a train? Never starred in a motion picture (except Moses), and still do not have a Monday holiday named after them?! It's true! Come, take an adventurous ride back into time with us, and learn about some ordinary people whose faith in GOD helped them accomplish extra-ordinary things!
Remember Noah? Just how does a man build a boat that big? And Moses...he gives a whole new meaning to the phrase "You da Man!" We will explore Bible heroes from both the Old and New Testaments, and of course we will learn about our Greatest example JESUS. We will explore this through play acting, and puppetry, costuming, and set design, make-up and surely we will learn our lines! Come, join us in the Word, and learn what we mean by "role model".

Ages: 3rd - 6th
Sessions 1, 2, 3 & 4. Mornings 9:00am - 12:00noon

Bio: Instructor Ann-Marie Czaja is an accomplished teacher at Paradise Valley Christian School. She has 2 children Christopher-7 and Sarah-3½! They are the loves of her life. Anna-Marie enjoys teaching, we know you find her just delightful!

Bible Tales We @ Desert Mountain Summer Camp believe in a little something for everybody! That's why we have created this version of our Bible Heroes for the little Guys and Gals! Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn of the importance of Bible reading by the age 12 chances are slim that they ever will in this life?! We think it is important to start as young as possible! We will Sing, Act, Dance and Relive some the Greatest stories ever told! And maybe... we'll even have a surprise visit from Bob the Tomato and Larry the Cucumber the award winning "Veggie-Tales" guys! (so much for the surprise!)

Ages: Pre-k thru 2nd
Sessions: 1, 2, 3 & 4. Mornings 9:00am - 12:00noon

Note: these classes are Non-denominational in nature.
-All Faiths are Welcome-

Summer Camp Phone 602-996-3035

<u>Calling all American Girls!</u> Do you love American Girl dolls, and want to know more about American History? This class, the students will explore the different time periods of our great history through the wonderful world of the American Girl Doll collection. This two week session will be devoted to Samantha Parkington, in the time period of 1904-1906. Students will enjoy crafts enjoyed by girls their same age almost 100 years ago! Plus, they will be involved in a play about Samantha. We will work on scenery, costumes, and acting, and at the end of our 2-weeks together, we will have a delightful Tea party! Join us, and please understand, you do not have to own an American Girl doll to participate!!

Ages: 3rd-6th
Sessions 1,2,3 & 4. Mornings 9:00am - 12:00noon

Bio: Instructor Gina Salo is a Teacher at Zuni Elementary School where she has taught 3rd grade for six years now. Gina is a graduate of ASU, and has a Master's in Elementary Ed from ASU West. She has two girls of her own, who are American Girl Doll collectors, this is why she enjoys teaching this program! Gina will share her enthusiasm with your girls too!!

<u>Victorian Soap and Candlemaking</u> Now here is a real different idea in the Arts and Crafts department! There is just a certain charm associated with the glow of candlelight in a room, or the scent of sweetly fragranced soaps! In this course we want to share the centuries old techniques of these Arts with the children, in order that they may create their very own signature style of crafting. Come join us for what promises to be one of the unique classes we have ever offered!

Ages: 2nd-8th
Sessions: 1,2,3 & 4. Mornings 9:00 am - 12:00 noon

Bio: Instructor Mindy O'Brien (session 1&2) was born a teacher! Of this I'm sure. Mindy juggles her busy schedule with Alahambra School District, while persuing her Master's Degree. She is fluent in Spanish, and enjoys hiking, gardening, and scrapbooking. She is a terrific person!

**All necessary materials for classes are provided for in the cost of your tuition!

Cater to the Kids! "let them eat cake!" That's right, and cookies and Spaghetti, eggs & French toast, how about a "Philly Hoagie"?! MMMMMM... does that sound good! We have designed the most incredible cooking skills class for your kids, and these are just a sampling of the kinds of food the children will learn to make. We'll start with Safety in the kitchen, and talk about efficiency and clean-up. Then we will dive into meal planning for breakfast, lunch, and dinner. We'll discuss Nutrition and food freshness, the proper table setting, and dining etiquette. This complete approach to cooking will give your Chef-in-training a well-rounded experience they will never forget! By the way Guys this is not just a "Girl" class!

Ages: 1st-6th
Sessions: 1,2,3 & 4. Mornings 9:00 am - 12:00 noon

Bio:(for June Sessions) Instructor Susan Angelo is a third grade teacher with Sunset Canyon School. She is currently completing her Master's in Educational leadership, and she just loves to cook! Your children will enjoy working with her. No doubt.

Bio: (for July Sessions) Instructor Stacy Dean is a native Californian, and a Graduate of the Scottsdale Culinary Institute. She is a professional caterer, and a full-time mommy to 5-year-old son: Wyatt. Stacy is very excited to be teaching your children this summer!

Desert Mountain Junior Golf ... Now there are a few qualifications of being a true "Zonie"! You've gotta love Golf, You've gotta love Golf, and You've gotta play Golf! Arizona is the proud home of the finest in golfing in the world, and we feel it is our job to equip your children with the knowledge of how to play the game. We will develop swing technique, help them with the right equipment choices, learn Golf course etiquette, and professional rules and reg's. Join us in our Air-conditioned "Club House" right here on campus, and learn one of the finest sports. ** Child -size clubs and equipment will be provided by our Pros!

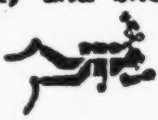
Ages: K -8th
Sessions: 1,2,3 & 4. Mornings 9:00 am - 12:00 noon

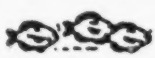
Exploring with the Magic School Bus Send your child on an adventure this Summer on the Magic School Bus. We will be traveling to many exciting destinations as we explore places such as the Solar System, inside a beehive, under the Sea and inside a Volcano! Your child will be doing many fun, hands-on activities such as building their very own desk top model of the Magic School Bus. They will use their imaginations, and learn about Science! Other topics include: the 5 senses, Plants, Animals, Dinosaurs and Insects. If you're looking for fun and excitement... The Magic School Bus will be loading this summer!!

Ages: K-3rd

Sessions 1, 2, 3, & 4. Mornings 9:00am - 12:00 noon

Bio: Instructor Aimee Perdue is currently teaching 3rd grade at Sunset Canyon Elementary in the PV district. Educated at NAU, Aimee majored in Education, with a minor in Business. She is an experienced summer camp counselor who just loves working with children, and she's way cooler than Miss Frizzle!





Kinderprep This is our "Trademarked" brand of fun for your 5 and 6 year-old boys and girls who are getting ready for Kindergarten! This is an Activity filled course to help create readiness in your youngster. Regardless of whether you will be Home-schooling, or putting them in a more traditional classroom environment. We will emphasize independence and creativity, while learning to work together as a team. We will have Story time, Arts and Crafts, Numbers and Letters, Handwriting, Water Day, Safety, even a trip to the Magic School Bus to learn about Science! This is the coolest "Boot-camp" for your Pre-K kids, and a time they will never forget!!

Ages: 5 and 6 year olds

Sessions: 1, 2, 3 & 4. Mornings 9:00am - 12:00noon

Bio: Instructor Miss Stephanie Cruikshank in a word...AWESOME! With her enthusiasm, and energy, this might be the first time you have ever seen your kids trying to keep up with the teacher! Stephanie has her Bachelor's Degree in Health Ed from the University of Nevada, and she LOVES Gymnastics and kids!

Let's Da...e with LeAnna Can you feel it? Come... experience the music with all of your senses! Dance is the perfect expression of the way we hear sounds in our music. In this class we will experience the many traditional styles of dance, then we will create new and unique choreography. Come and learn new practice routines, warm-up and cool-down techniques, body fun games, and we will even take some time to craft our very own sports bag for our dance attire! If you love to dance, or are enthusiastic about learning to dance, join us!

Ages: 1st-6th
Sessions 1, 2, 3 & 4. Mornings 9:00am - 12:00 noon

Bio: Instructor Miss LeAnna Wolkis has been dancing since she was 3! An experienced Dancer, Model, Teacher, and Actress, her accomplishments include a Super Bowl XXX appearance, and a workout video with Paula Abdul! In fact, her professional resumé is longer than our whole Summer catalog!! LeAnna is currently teaching kindergaerten for the Paradise Valley School District.

Picture the Moment! Do you have lots of pictures of yourself with family, friends, or pets still in the original envelope or stuffed in a box? We have the perfect way to organize and preserve your treasure, photos, and memories. Scrapbooking. What a most excellent way of arranging your photos to capture the essence of a person or event, and turn your cherished memories into a personal work of Art! The best part is that others can share in the memories. Come and create your own scrapbook that expresses your individuality! A treasure you can add to throughout your life. Bring your Photos, Ribbons, Buttons, Awards, Favorite Birthday cards, and News clippings with you, We'll supply the rest!

Ages: 3rd-8th
Sessions 1, 2, 3 & 4. Mornings 9:00am - 12:00 noon

Bio: (for June sessions) Julie Morse is a Michigan Girl who started her career teaching in 1992. She is trained in Elementary Education, she also has a minor in German! Julie is a caring person, who loves to spend time with her friends sharing wonderful memories!

Bio: (for July sessions) Mindy O'Brien was born a teacher! Of this I'm sure. Mindy juggles her busy teaching schedule with Alahambra School District, while persuing her Master's Degree. She is fluent in Spanish, and enjoys hiking, gardening, and scrapbooking. She is a terrific person!

Rocket Science 101 Have you ever dreamed of being an Astronaut? Wouldn't you just love to know what it feels like to orbit the Earth?? Or travel to a planet where no one else has been?! We DO! And we would like to share our enthusiasm with you. Come along Junior Astronauts to the farthest reaches of space, and we'll explore our Solar System on the way. We will plot out the constellations, construct our very own Planetarium, and scratch build our own personal Rocket Space Shuttle using everyday materials found in your home! ...All systems go for launch...8 weeks and counting...this class is a *must* for all you adventurers!

Ages: 1st-6th
Sessions 1, 2, 3 & 4. Mornings 9:00am - 12:00 noon

Bio: Instructor Jeanine Ryan-Frandsen is a third grade teacher with Sunset Canyon Elementary who comes from a family of educators! She is strong in the area of computers and technology, and will complete her Master's Degree in Elementary Ed this summer. In her free time, Jeanine enjoys gardening. Your kids will love working with her!

Team Arizona-Sports Camp Hey sports Girls and Guys! Have we got a one-of-a-kind Sports camp for you. When we put this program together, we wanted to focus on *fitness for life*. We will start with learning about healthy bones and muscle tone. Next, we develop real team building strategies critical to athletic corporation. Then, jump in! Hockey, Soccer, Dodgeball, Frisbee golf, and Basketball! Did we leave anything out? Oh yeah, enjoy it in the comfort of our indoor, air-conditioned PE facility! WOW! Before we wrap this thing up, we'll give you a lesson on Sports Medicine from the Pros! See you on the Court!

Ages: 3rd-6th
Sessions 1, 2, 3 & 4. Mornings 9:00am - 12:00noon

Bio: Instructor Jalie Yoe is a native Texan, and a *serious* Women's Soccer Player! She currently teaches third grade at Grayhawk Elementary School. Jalie enjoys all sports with energy unmatched! Stand close, it might rub off!!

Gymnastics wi.. Miss Stephanie Are you ready? We want to energize you with this special course at a special price! Miss Stephanie will cover all the basics of gymnastics and floor exercises in two weeks. We will learn stretching and the proper warm-up techniques, cover muscles and body parts, focus on continued concentration, and balance, while stressing the importance of... Flexibility! We will emphasize interaction with our classmates as a team, and to top it all off, a lesson on Health for Life! We are certain you will jump at this one.

Ages: 5-13 years
Sessions 1, 2, 3 & 4. Afternoons only from 1:00-2:30
Price: $105
Instructor: Stephanie Cruikshank (see Kinderprep)

Elementary Spanish Se habla Espanol? Well you can if you like! If you are interested in learning Spanish, there's no better time to start than NOW! We will introduce you to the basics of the language in a FUN and interactive format that will include: Song, Poetry recital, Spelling, and Play-acting! Please, come join us in one of our "special" afternoon classes, and get a head start on your bi-lingual skills!

Ages: K-3rd
Sessions: 1, 2, 3 & 4. Afternoons only 1:00-2:30pm.
Price: $105.00

Martial Arts When we say "Martial Arts" what does this bring to mind? Maybe discipline? Focus and coordination? Mobility and physical conditioning? How about self-control and respect for others. Above all else...maybe self-confidence! Martial arts training has passed these valuable life-skills down through the generations. These are lessons that will benefit anyone that seeks to better him or herself! Join us in the afternoon for a workout in our air-conditioned, and comfortable Dojo!

Ages: K-6th
Sessions: 1, 2, 3 & 4. Afternoons only 1:00-2:30pm
Price: $105.00

These are Afternoon Specials

Old West Leathercrafting The Arizona Territory is rich in Western lure, and interestingly, some of the highest demand craftsmen of that day were leathercrafters! These were highly skilled trades people that could create everything from a simple coin purse to a very intricate saddle. Come, take a trip into the past with us as we learn to cut and stamp leather punch and stitch, and dye cowhide to bring out its natural beauty. Cowgirls will make a Prairie Purse, and Cowboys will make Saddlebags!

Ages: 3-13 years
Session 3 only. Afternoon only from 1:00-3:00
Instructor: Joe Hills

The Afternoon Workshop-Carpentry for kids! Are you one of those people who just loves to build? Do you enjoy creating something special, and having the satisfaction of knowing you did it with your own 2 hands? Well then, this is your class! We'll start with tool safety, and move through the basics of hammering, glue-up, assembly, finish sanding, and prep & paint. The children will have a working knowledge of finish carpentry, plus they will build two complete projects of their choosing! (project choices will be available to view on the first day of class)

Ages: 3-13 years
Sessions 2 and 4 open. Afternoon only from 1:00-3:00

BIO: Instructor Joe Hills has successfully taught the Afternoon Workshop for 7 years now! He enjoys sharing his love for the Art of woodworking with the children. Joe and his wife Maryann have 4 little carpenters of their own; 2 boys and 2 girls! He has been a resident of Scottsdale for 28 years.

*All necessary materials for classes are provided for in the cost of your tuition!

-please cut along this line-

Please make your checks payable to: a little Sonshine from Arizona. THANKS.

Child #1 Name _____ Age _____

Child #2 Name _____ Age _____

Parent or Guardian _____

Address _____ City _____ Zip _____

Home Phone _____ Work Phone _____ Emergency# _____

Child #1	Child #2
_____ class/session	_____ class/session
_____ afternoon specials/session	_____ afternoon specials/session
Morning Tuition $ 195	Morning Tuition $ 195
Lunch Bunch $ _____	Lunch Bunch $ _____
Afternoon spec. $ _____	Afternoon spec. $ _____
Aftercare $ _____	Aftercare $ _____
Total $ _____	Total $ _____

Registration is NOW!
There are FOUR easy ways to register for Camp!

Mail-in
Send your form to the DMSC
5119 E. Shaw Butte Dr
Scottsdale, AZ 85254

*Attach your check to the form, upon receipt, we will call you with a confirmation number.
(this is the FASTEST way to GUARANTEE a registration for your children!)

Drop-in
Drop off your registration at:

Anasazi	Aztec
Cheyenne	Cochise
Desert Canyon	Laguna
Zuni	

*There will be a box in each office in which to leave your registrations. We will pick them up, and call you with a confirmation #.
(this is certainly convenient when dropping off or picking up your child)

Phone-in
****The Camp Phone is: 602-996-3035
You may phone in your Registration for Camp. You have 72 hours for us to receive your check. (no postdating.) Upon receipt of your check we will call you with a confirmation number. After 72 hours, your registration drops out of our system. No guarantees, no exceptions!

On-site
We will be available at these Campuses to help You Register:

Zuni Elementary	Tuesday April 25 @ 2:15pm
Laguna Elem.	Wednesday April 26 @ 2:45
Desert Canyon	Thursday April 27 @ 2:45
Anasazi Elem.	Friday April 28 @ 2:15

Families attending Paradise Valley School District, Local Private Schools or Home-Schoolers, feel free to use any of our REGISTRATION OPTIONS!

*Questions? Call 602-996-3035
We are eager to answer any questions for

YOU!

REGISTRATION DEADLINE IS MAY 26, 2000

Note: There is a $25. Fee for any cancellations

Aftercare is only available to our students who participate in AM sessions

We at Desert Mountain Summer Camp want to especially THANK our Community leaders who have generously committed their time and resources (at no cost to you!) to insure your child has a successful summer experience. Look for them on Campus!!

Arizona Department of Game and Fish
Arizona Department of Health Services
Arizona Junior Golf Association
Arizona Tobacco Information Network (ATIN)
Arizona State Capitol
City of Scottsdale
City of Phoenix
Home Depot
R.E.I.
Popular Outdoor Outfitters
Scottsdale Bible Church
Scottsdale Culinary Institute
Scottsdale Tobacco Education and Prevention Program
St. Patrick's Church

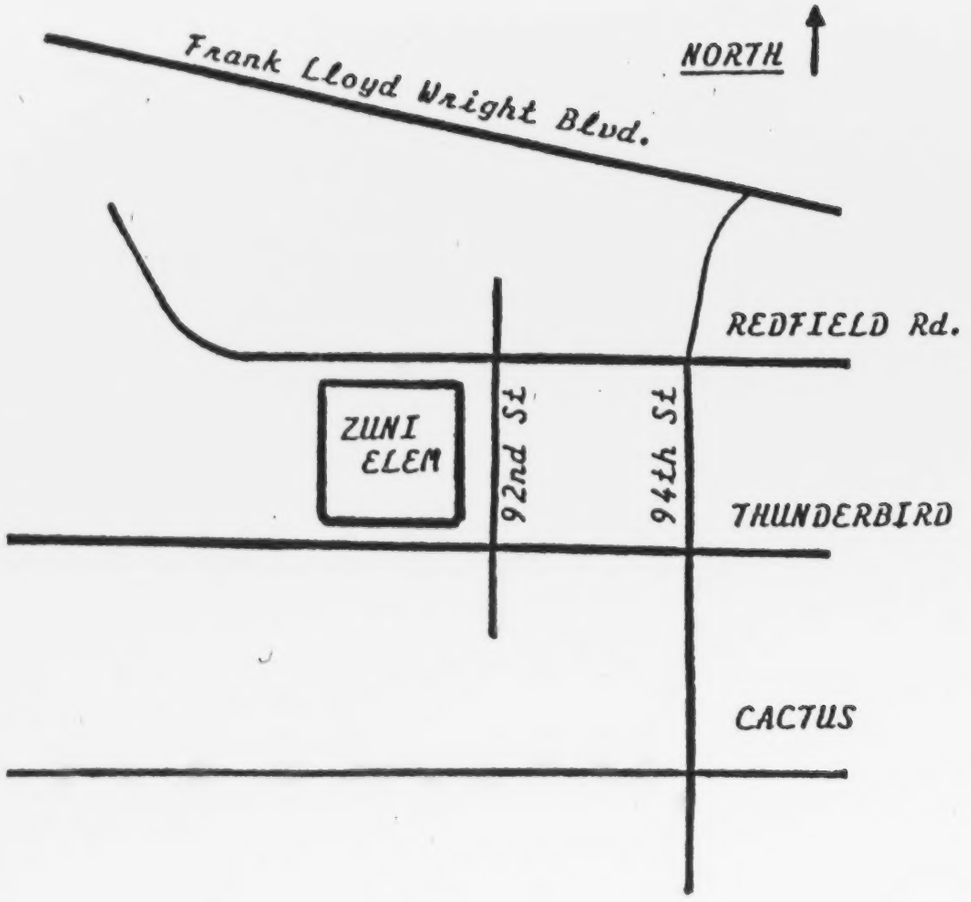
a little Sonshine from Arizona is an Arizona Educational Non-profit Organization. We provide equal opportunity for all. We do not permit discrimination on the basis sex, age, race/national origin, physical ability, or religious preference.

The Desert Mountain Summer Camp
is located at:
ZUNI Elementary School

9181 East Redfield Rd
Scottsdale, AZ 85260

CAMP PHONE: 602-996-3035

Send your form to the DMSC
5119 E. Shaw Butte Dr
Scottsdale, AZ 85254



Supreme Court, U.S.
FILED
DEC 18 2003
OFFICE OF THE CLERK

(3)

No. 03-693

IN THE

Supreme Court of the United States

SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48, *ET AL.*,

Petitioners,

v.

JOSEPH J. HILLS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

ALAN E. SEARS
BENJAMIN W. BULL
GARY S. MCCALEB
SUITE 165
15333 N. PIMA ROAD
SCOTTSDALE, AZ 85260
(480) 444-0020

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
WALTER M. WEBER
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

KEY TO ABBREVIATIONS iv

INTRODUCTION 1

STATEMENT 1

1. Nature of the Case 1

2. Pertinent Facts 2

3. Course of Proceedings and Disposition Below 4

ARGUMENT 6

I. PETITIONERS RELY ON A MISREADING OF DICTA IN THE OPINION BELOW. 6

II. PETITIONERS IDENTIFY NO CIRCUIT CONFLICT. 9

III. THE DECISION BELOW WAS CORRECT. 9

IV. THERE IS NO WARRANT FOR HOLDING THE PETITION HERE PENDING THE PLEDGE CASE. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Mergens, 496 U.S. 226 (1990) 5

Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, No. 03-1534 (4th Cir. argued Sept. 24, 2003) 9

Child Evangelism Fellowship of New Jersey v. Stafford Township School Dist., No. 03-1101 (3d Cir. argued Sept. 11, 2003) 9

Elk Grove Unified School District v. Newdow, No. 02-1624 (U.S. cert. granted Oct. 14, 2003) 10

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 8, 10

Hedges v. Wauconda Community Unit School District No. 118, 9 F.3d 1295 (7th Cir. 1993) 5

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 10

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 8, 10

Rusk v. Crestview Local Schools, No. 02-3991 (6th Cir. to be argued Feb. 4, 2004) 9

CONSTITUTIONS AND RULES

Rule 60(a), Fed. R. Civ. P. 4

U.S. Const. amend. I 5, 9

KEY TO ABBREVIATIONS

Dkt.	=	Docket entry number (D. Ariz.)
ER	=	Excerpts of Record (9th Cir.)
Pet.	=	Petition for Certiorari
Pet. App.	=	Appendix to Petition for Certiorari
SUSD	=	Scottsdale Unified School District

INTRODUCTION

In this case the court of appeals correctly invalidated a school district's blatant viewpoint discrimination against private speech. There is no warrant for Supreme Court review of this straightforward application of settled law.

The school district's petition for certiorari primarily complains about one small portion of the opinion below. As discussed below, petitioners' contentions rest on a misreading of that opinion, present a premature issue, and do not present an actual controversy between the parties.

To illustrate these points, it is necessary first to recap the facts and the course of proceedings.

STATEMENT

1. Nature of the Case

This is an "equal access" case. Respondent Joseph J. Hills, plaintiff-appellant below, challenged the constitutionality of a school district's literature distribution policy on its face and as applied. The school district allows private nonprofit community organizations to submit to schools, for distribution to students, a wide range of materials promoting events and activities. The school district, however, categorically forbids distribution of fliers of a "religious nature." Although the school district routinely approves the distribution of fliers promoting summer camps, the school district forbade Hills from distributing a brochure promoting a summer camp that included, among nineteen total courses, two classes on "Bible Heroes" and "Bible Tales." Neither the Bible nor religion are themselves forbidden topics; rather, it was the religious *viewpoint* of these two planned summer camp courses that the school district found objectionable.

Hills brought suit in federal court challenging the school

district's viewpoint-discriminatory policy and practice. Hills raised, *inter alia*, federal constitutional claims alleging violations of his right to free speech, free exercise of religion, equal protection of the law, due process of law, and freedom from the establishment of religion. Hills requested declaratory and injunctive relief and damages.

The district court rejected Hills's claims on cross-motions for summary judgment, but the Ninth Circuit unanimously -- and correctly -- reversed on the basis that the school district had violated Hills's federal constitutional right to free speech.

2. Pertinent Facts

Petitioner Scottsdale Unified School District (SUSD) has a policy[1] and practice of allowing outside groups to distribute, through the school's literature distribution system, brochures and other promotional literature to students at SUSD schools to take home to their parents. The policy authorizes, as a community service, the dissemination of material regarding events and activities of interest to students and their parents.

SUSD approved about one hundred fliers for distribution in each of the years 1999 and 2000. ER 196-206. Events and activities commonly promoted in the fliers included: summer camps; sports leagues; art classes, performances, or exhibits;

---

[1]Petitioners include in their Petition Appendix only the policy adopted in or about March, 1998. Pet. App. 49. That policy was modified several times thereafter. In 1999, SUSD officials determined that SUSD would only allow distribution of materials on behalf of nonprofit and governmental programs or organizations. ER 84, 93, 135. On Apr. 24, 2000, in response to petitioner Hills's brochure, SUSD added a requirement that all fliers contain a disclaimer. ER 192-93. On Oct. 17, 2000, SUSD formally adopted a new policy on the distribution of promotional materials. ER 187, 191. Notably, this new policy omitted the previous ban on commercial materials, though it retained the requirement that materials be "non-religious in nature and content." ER 187.

various YMCA activities; and, a miscellany of other matters such as a breast cancer awareness walk, recruitment of foster parents, a college fair, a town meeting on funding for education, a fall festival at a church, a holiday lights display, Halloween safety tips, and even a birthday party for the Teen Night Director of a Boys and Girls Club. The only basis SUSD *ever* asserted for declining to distribute a flier (aside from respondent Hills's camp flier) was failure to comply with either the (former) nonprofit/noncommercial rule or the (subsequent) disclaimer requirement. ER 90-91, 195-206 & nn.2, 4. *See supra* note 1.

Respondent Hills is a Scottsdale, Arizona, resident who had approximately seven years experience teaching in after-school programs, including programs for which promotional materials had been distributed pursuant to SUSD policy. In 1999, Hills decided to offer a summer camp through "A Little Sonshine from Arizona," a nonprofit corporation of which Hills is president. Hills intended to advertise the camp via a Camp Brochure, Pet. App. 50, to be distributed through SUSD schools. As indicated in the Brochure, the summer camp would offer nineteen courses. Two of the courses, "Bible Heroes" and "Bible Tales," included religious content in their titles and course descriptions.

Hills initially obtained SUSD approval for the distribution of his Camp Brochure. SUSD subsequently revoked permission, however, and ultimately forbade distribution of the Camp Brochure, asserting concern about violating the Establishment Clause, ER 194. SUSD officials informed Hills that if he wished to distribute his brochure, he would have to remove the listings and descriptions of the two Bible classes as well as remove the accompanying religious graphics (a Bible, a cross, and a dove carrying an olive branch). ER 149, 155-56, 194.

Hills intends to advertise and operate similar summer camps in the future. It is undisputed, however, that if his future camp

brochures contain similar religious content, SUSD would not allow their distribution. ER 195.

It is undisputed that Hills's nonprofit corporation is an entity eligible to distribute literature under the SUSD policy. It is likewise undisputed that SUSD has approved summer camp fliers, fliers containing course listings and descriptions, and fliers containing graphics (including, *inter alia*, a dove, a menorah, and a witch). It is undisputed that even religious topics are permitted in fliers, so long as the *viewpoints* from which the topics are addressed are historical, literary, etc., but not *religious*. ER 120-21, 124, 153, 155.[2]

3. Course of Proceedings and Disposition Below

Respondent Hills filed his complaint in federal district court in Arizona on June 8, 2000. After further pleadings and discovery, the parties stipulated to much of the facts and filed cross-motions for summary judgment. In an order filed November 5, 2001, the district court denied Hills's motion for summary judgment and granted the motion of petitioners (defendants-appellees below) for summary judgment. Pet. App. 27. A separate final judgment was entered the same day.[3]

Hills appealed. On May 22, 2003, a unanimous panel of the Ninth Circuit reversed and ruled in favor of Hills.

The Ninth Circuit panel of Judges Canby, Hawkins, and

---

[2]As SUSD Superintendent Barbara Erwin testified, the crucial question would be "Are you doing a historical perspective on the Bible, . . . or are you actually teaching Genesis and the creation story?" ER 120.

[3]On November 19, 2001, petitioners moved under Rule 60(a), Fed. R. Civ. P., to correct certain factual errors in the district court's Order. On January 28, 2002, the district court granted defendants' motion to correct certain factual errors in its Order. An Amended Order was filed the same day. (Curiously, petitioners do not include this Amended Order in their Petition Appendix.) The judgment previously filed was left undisturbed. Dkt. 104.

Berzon issued a per curiam opinion. In that opinion, the court observed that, under Supreme Court precedent, "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum simply because the subject is discussed from a religious viewpoint." Pet. App. 14. The court concluded that SUSD's "exclusion of Hills's summer camp brochure because it offered Bible classes from a Christian perspective does just that, and therefore constitutes impermissible viewpoint discrimination." *Id.*

The court below also found SUSD's asserted Establishment Clause defense meritless. Pet. App. 16-22. Among other things, the court noted that the community fliers "are certainly not part of the teacher's instruction or curriculum." Pet. App. 18. Also important was the fact that "the brochures are sent home with students so that *their parents* can select extra-curricular activities for their children." Pet. App. 18 (emphasis added). The "express disclaimer" in the brochure, *id.*, the simultaneous distribution of fliers from numerous other organizations, Pet. App. 20, and the fact that the school neither discussed nor drew attention to any particular fliers, *id.*, further mitigated any Establishment Clause concerns. Drawing guidance from this Court, the court of appeals recalled that schools "'do not endorse everything they fail to censor.'" Pet. App. 21 (quoting *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality)). The court concluded that "'[t]he school's proper response is to educate the audience'" about "'the difference between private and public action, . . . rather than squelch the speaker.'" Pet. App. 21 (quoting *Hedges v. Wauconda Community Unit School District No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)).

In sum, the court ruled that SUSD "violated Hills's rights under the Free Speech Clause of the First Amendment," Pet. App. 23, and that there was no valid Establishment Clause defense to SUSD's viewpoint discrimination, Pet. App. 22.

En route to its decision, the court below observed that, while *viewpoint* discrimination is forbidden, schools are not powerless to *limit the scope of the relevant forum* along viewpoint-neutral grounds. Pet. App. 14-16. Thus, the court opined, while SUSD created a forum for *advertising events*, that forum "was never opened for pure discourse," Pet. App. 14 -- such as a religious tract, *id.* (or, for that matter, a poem, an environmental advocacy pamphlet, the Sunday funnies, or some other item that was not a promotion of some event or activity). Thus, SUSD's allowance of fliers promoting "extra-curricular activities that would no doubt be of interest to many schoolchildren," Pet. App. 15, created a forum for fliers "to advertise an event or class," Pet. App. 14, and not necessarily a forum for "pure discourse," *id.* Of course, the court emphasized, a limit on the scope of the forum would be constitutional only "so long as all such viewpoints are treated even-handedly," *id.* *Accord* Pet. App. 23 ("As discussed above, however, the policy still must be applied in a viewpoint neutral manner").[4]

ARGUMENT

I. PETITIONERS RELY ON A MISREADING OF DICTA IN THE OPINION BELOW.

Seizing upon *dicta* in the decision below, petitioner SUSD contends that the court of appeals has *required* SUSD to review

---

[4]SUSD erroneously states that the Ninth Circuit "held the [school] District was not required to distribute Hills' brochure as submitted," Pet. at 4. Rather, the court below said, "We do not, however, mean to suggest that the District must distribute Hills's brochure as it was originally proposed," Pet. App. 15. The propositions "We say not X" and "We do not say X" are not logically equivalent. In the case at bar, the court of appeals limited its holding to a condemnation of SUSD's stated grounds for rejecting Hills's flier. Pet. App. 16. The court did not go beyond that holding. Pet. App. 15-16 & n.6.

private literature for, and to censor out, speech "proselytizing" religious ideas. Not only is this inaccurate, the issue it supposedly presents is premature and, moreover, not even controverted -- both petitioners and respondent agree that it is unconstitutional for schools to censor out religious speech. Indeed, this concession by petitioners dooms their half-hearted (Pet. at 10-12) swipe at the merits of the decision below.

First, petitioners' premise is mistaken. The Ninth Circuit said schools *can* limit the fora they create for private speech, not that they *must* do so. Certainly a school district could limit community event announcements, for example, to a "white pages" format that, without commentary, merely lists the name, date, and place of the event and provides contact information. Or a school district could limit the forum, for example, to notices of athletic events. The Ninth Circuit held only that, *if* a school district creates a forum open to certain speech, it cannot exclude "speech discussing otherwise permissible subjects" -- such as summer camp offerings -- "simply because the subject is discussed from a religious viewpoint." Pet. App. 14.

Petitioners' premise is mistaken in another crucial respect: the Ninth Circuit did not direct the imposition of special restrictions on private *religious* speech. Indeed, to do so would not only be unconstitutional, as all parties agree, *see* Pet. at 6, 7, 9, but would run contrary to the whole thrust of the lower court's opinion. Thus, whether a flier containing religious proselytization "exceeds the scope" of a school's forum, Pet. App. 15, hinges not on whether *religious* advocacy is allowed, but rather on whether advocacy *in general* is allowed. "[T]he policy still must be applied in a viewpoint neutral manner." Pet. App. 23.

Second, the issue petitioner seeks to present -- the permissibility of censoring only *proselytization* from a forum for private speech -- even if not already answered in the negative by

this Court's precedents, *see Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), is in any event premature in the present case. SUSD objected to Hills's brochure because of its religious perspective on otherwise permissible topics. SUSD has never imposed a prohibition on advocacy speech, as such, within a flier announcing an event. On the contrary, SUSD has approved fliers containing advocacy, not just of the event advertised, but of ideas in general. *E.g.*, ER 219 (approved YMCA flier) ("Democracy must be learned by each generation"); ER 317 (approved Halloween safety tips flier) ("The last panel of this brochure is VERY IMPORTANT! Sit down with your children and go over these points carefully [because this] can be life saving information for them to learn. . . . [W]e believe children and parents should know how to make this observance as safe and secure as possible"). SUSD in fact never objected to advocacy in Hills's brochure either. *See, e.g.*, Pet. App. 52 (Arizona Camping and Desert Survival course) ("Arizona camping and desert survival is a 'life skills' course, and a *must* for everyone! . . . This course could save your life!!"). Thus, under SUSD's current policy, the "proselytization" of ideas or actions does not disqualify a flier otherwise eligible for distribution. Should SUSD at some future date decide to prohibit the distribution of fliers containing advocacy speech, then at that time the constitutionality of such a restriction would become ripe. It is not ripe now.

Third, there is no controversy between the parties over the unconstitutionality of requiring school officials to act as "religion editors" excising from *private* speech content that is "too religious." SUSD contends that such a requirement would be unconstitutional, Pet. at 6, 7, 9, and respondent agrees. The disagreement between the parties here stems rather from SUSD's misreading of the Ninth Circuit's opinion. SUSD reads the

lower court's *dicta* as requiring admittedly unconstitutional government censorship of private religious speech. As noted above, the Ninth Circuit required no such thing. And even if the court of appeals were understood to have *authorized* (albeit not required) such censorship, the issue would be premature, as SUSD has no obligation to adopt, and has thus far not adopted, a policy forbidding only religious *advocacy* (as opposed to its current ban on *all* private literature with a religious viewpoint). Given that all the parties agree on the unconstitutionality of requiring school officials to "scrutiniz[e] the speech presented and excis[e] religious references," Pet. at 6, it would appear likely that SUSD never will adopt such a policy.

II. PETITIONERS IDENTIFY NO CIRCUIT CONFLICT.

SUSD does not even claim that there is any relevant conflict in the circuits. And while similar issues are pending in at least three other circuits,[5] this fact counsels *against* review, in order to allow further development of the law in the federal circuits. Importantly, such development may well never yield a conflict necessitating Supreme Court review.

III. THE DECISION BELOW WAS CORRECT.

SUSD raises only a feeble challenge to the actual merits of the decision below. Pet. at 10-12. The court of appeals held that, if

---

[5]*See Child Evangelism Fellowship of New Jersey v. Stafford Township School Dist.*, No. 03-1101 (3d Cir. argued Sept. 11, 2003) (challenge to denial of equal access to school's literature distribution forum for religious community group); *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, No. 03-1534 (4th Cir. argued Sept. 24, 2003) (same); *Rusk v. Crestview Local Schools*, No. 02-3991 (6th Cir. to be argued Feb. 4, 2004) (Establishment Clause challenge to allowance of equal access to school's literature distribution forum for religious community groups).

a school district creates a forum for the distribution of fliers, to be taken home to parents, promoting events of interest to students, then otherwise permissible fliers cannot be excluded solely because they reflect a religious viewpoint. This is no more than an unremarkable application of this Court's repeated condemnation of discrimination against the religious viewpoint of private speech. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger*; *Good News*. Petitioners themselves concede that the censorship of a private religious viewpoint from the fliers would be unconstitutional. Pet. at 6, 7, 9. Hence, this case does not merit review.

IV. THERE IS NO WARRANT FOR HOLDING THE PETITION HERE PENDING THE PLEDGE CASE.

SUSD suggests that this Court should hold the present case pending the decision in the Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow*, No. 02-1624 (U.S. cert. granted Oct. 14, 2003). But that challenge to *state action* is far afield from the present case involving equal access for *private speakers*. The mere fact that *Newdow* involves schools and the Establishment Clause does not make that case similar to the present one in any material respect.

There is no reason to hold the present position pending *Newdow*.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

Alan E. Sears
Benjamin W. Bull
Gary S. McCaleb
Suite 165
15333 N. Pima Road
Scottsdale, AZ 85260
(480) 444-0020

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
James M. Henderson, Sr.
Walter M. Weber
David A. Cortman
American Center for Law
and Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for Respondent

December 18, 2003

(2)

No. 03-693

Supreme Court, U.S.
FILED
DEC 29 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48, *et al.*,

Petitioners,

v.

JOSEPH J. HILLS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

W. SCOTT BALES
Counsel of Record

MARY ELLEN SIMONSON
ROBERT G. SCHAFFER
KIMBERLY A. DEMARCHI
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REASONS FOR GRANTING WRIT

In his opposing brief, respondent mischaracterizes a key portion of the Ninth Circuit's holding as dicta and misconstrues this Court's opinion in *Good News Club*. While there should be no doubt on either interpretation, respondent's confused analysis of both opinions and the critical First Amendment issues they present, is precisely the reason why this Court's clarification is required for not only Scottsdale Unified School District, but all public schools. The Ninth Circuit's decision squarely presents the question reserved by this Court in the *Good News Club* case: whether viewpoint-based discrimination necessary to avoid an Establishment Clause violation is constitutionally permissible. As the Ninth Circuit's decision now stands, it requires the kind of entanglement with religion that this Court has held the State must avoid.

Contrary to respondent's characterization of the issue as "dicta," the Ninth Circuit expressly acknowledged and held that the District was not required to distribute respondent Hills' actual brochure. With its religious proselytizing language, it *both* fell outside the scope of a limited purpose public forum for the distribution of event and activity announcements *and* would pose potential Establishment Clause problems if it were distributed in a public school, by public school teachers, to elementary age children.

> We do not, however, mean to suggest that the District must distribute Hills's brochure as it was originally proposed. . . . However, because the District has created only a limited public forum, it could still exercise some control over the content of Hills's brochure, to the extent that

some of the language in the proposed brochure exceeds the scope of the District's forum.

For example, Hills's brochure contained the language "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!" This language was promotional *not only of the class but of religion*, and went beyond a description of the organization's general religious mission to directly exhort the reader to involve children in religious observance. We stated in *Prince* that the World Changers Club could announce its meetings using the school's facilities but could not in so doing "pray and proselytize." Likewise, the District is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this exceeds the purpose of the forum the District created. [FN 6: This particular language might also present Establishment Clause concerns; however, because we do not need to address the specific content of Hills's brochure to determine that viewpoint discrimination occurred, we do not reach that question.] Exclusion of such material would not be based on viewpoint, but on subject matter. In other words, the District cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, *but it can refuse to distribute literature that* itself *contains proselytizing language.* The difference is subtle, but important.

(App. 15-16 (emphasis added)). Unfortunately, the subtlety of this standard will lead school districts and other public entities down the road of government entanglement with religion that is prohibited by the Establishment Clause. And, it will lead to the type of misinterpretation that respondent's brief foreshadows – the mistaken belief that because the above is merely dicta, that the Hills brochure now can be distributed even with its proselytizing language included – a result that would brazenly ignore the Ninth Circuit's holding and foster new litigation.

More disturbing is respondent's theory that the opinion requires the District to distribute a flier – presumably Hills' flier – that contains the "proselytization" of religious ideas and religious actions, and that such "advocacy" speech is constitutionally permissible (Br. 10-11). Neither the Ninth Circuit opinion nor the *Good News Club* opinion said any such thing.

The Ninth Circuit noted that, because of its other holdings, it did not need to reach the question whether distribution of a flyer like Hills's flyer would violate the Establishment Clause. However, schools in the District's position do not have that luxury. They face instead the prospect that they must review every community flier they receive to monitor the "subtle" distinction between language that promotes the advertised event and language that promotes something else, like religious beliefs.

Hills argues in his brief in opposition (Br. 8) that speech advocating participation in the advertised event is common in submitted brochures, and may indeed be an essential part of a forum to advertise activities of interest to school-age children. Not so. The Ninth Circuit recognized that "the school's forum was never opened for pure

discourse." (App. 15). Even so, the opinion is clear that speech that *proselytizes* cannot be permitted consistent with the First Amendment, particularly in a setting where the speech is in the form of fliers that are given by public school teachers, during class time, to small children with an admonition that they carry the fliers home to their parents for review. The Ninth Circuit's decision thus forces the District to either close its forum entirely or to appoint itself a religious editor, scrutinizing submitted fliers and excising proselytizing language.

Ominously, respondent implies that more litigation is ahead for the District if it retains a policy that excludes proselytizing (Br. 10). In other words, if the District does exactly what the Ninth Circuit opinion says it can and must do – avoid religious proselytizing and religious advocacy speech in its forum – the respondent interprets the opinion, and apparently the *Good News Club* opinion, to not reach this important issue and therefore to leave this District and others vulnerable to continued litigation on the point (Br. 9-10). This is yet another critical reason why this Court must assist the District and all public schools in clarifying these issues.

CONCLUSION

Accordingly, the Ninth Circuit's decision requires the kind of entanglement with religion that this Court has held the State must avoid, and squarely presents the question reserved by this Court in the *Good News Club* case – whether viewpoint-based discrimination necessary

to avoid an Establishment Clause violation is constitutionally permissible. The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of December, 2003.

W. SCOTT BALES
Counsel of Record

MARY ELLEN SIMONSON
ROBERT G. SCHAFFER
KIMBERLY A. DEMARCHI
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioners